86-819 (1)

No.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

GLOVER BOTTLED GAS CORPORATION, SYNERGY GROUP, INC., NEW YORK PROPANE CORPORATION and VOGEL'S, INC.,

*Petitioners,*

—v.—

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. Is it a denial of due process for an administrative law judge to incorporate the entire record of a prior proceeding into a subsequent one where the charges underlying the two proceedings are separate and distinct?

2. Do the rules of evidence applicable to proceedings before the National Labor Relations Board allow the admission of prior testimony when the party who seeks to have such prior testimony admitted has made no showing that the witnesses are unavailable?

3. Where the charges underlying two administrative proceedings are separate and distinct, is it a denial of due process for an administrative law judge to circumscribe a party's cross-examination and attempts to present evidence on the ground that the matters sought to be raised had been covered in the prior proceeding?

4. Is it a denial of due process for an administrative law judge to reach substantive findings with respect to matters neither charged nor litigated?

## PARTIES TO THE PROCEEDING

The parties before this Court are the same as those identified in the caption of this petition.

## PARENT ORGANIZATION

The parent corporation of petitioners Glover Bottled Gas Corporation, New York Propane Corporation and Vogel's Inc. is petitioner Synergy Group, Inc. Synergy Group, Inc. has no parent organization.

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No.

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*Petitioners,*

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NATIONAL LABOR RELATIONS BOARD,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Glover Bottled Gas Corporation ("GBG"), Synergy Group, Inc., New York Propane Corporation ("New York Propane") and Vogel's, Inc. (hereinafter referred to collectively as the "Companies") petition for a writ of certiorari to review the decision and order of the United States Court of Appeals for the Second Circuit dated August 20, 1986 that upheld and enforced the Decision, Order and Direction dated June 11, 1982 ("Order and Directive") of Respondent National Labor Relations Board (sometimes hereinafter referred to as the "Board").

## OPINIONS BELOW

The opinion of the Court of Appeals (B)* is unpublished. Respondent's Order and Directive is reported in part at 275 NLRB No. 96. A copy of the full text of the Order and Directive is included in the appendix hereto. (C)

## JURISDICTION

The jurisdiction of this court is conferred by 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES

*Constitutional Provisions.*

### AMENDMENT V

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

*Statutes and Regulations.*

A) Rule 804 of the Fedral Rules of Evidence reads, in part, as follows:

### HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

* * *

(b) Hearsay Exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony.

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with

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* Letter references are to sections of the appendix.

law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

B) 29 C.F.R. Section 101.10 states, in part, that in unfair labor practice cases heard before the National Labor Relations Board

> "(a) The rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling.
>
> * * *
>
> (b)(2) Every party has the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts . . . "

## STATEMENT OF THE CASE

(1)

The procedural guidelines applicable to proceedings before the National Labor Relations Board provide, in part, that each party has a right to present his case or defense in such manner as allows for a "full and true disclosure" of the matters in dispute. (29 C.F.R. 101.10(b)(2) ) Despite such prescription, the Companies were denied an effective opportunity to squarely address many of the pertinent and wholly distinct substantive issues in each of the two proceedings, heard seriatum, that were the subject of the Order and Directive (and which are hereinafter referred to respectively as the First Proceeding and the Second Proceeding). This restraint on the Companies' right to a fair hearing stems from the Administrative Law Judge ("ALJ") (who presided at both proceedings) having, without timely notice,* incorporated as substantive evidence the

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* Not until the commencement of the Second Proceeding did the Board's General Counsel move for incorporation of the record of the First Proceeding into the Second. (I-1)

record of the First Proceeding into the Second. (I-1, 2) As a result of such incorporation, the ALJ refused to allow the Companies to develop numerous issues in the Second Proceeding in a manner germane to that proceeding despite the fact that the two proceedings were founded on distinct charges and legal issues. (I-4, 5, 6, 9)

Moreover, by incorporating the entire record of the hearing with respect to the First Proceeding into the record of the hearing with respect to the Second, the ALJ violated Fed. R. Evid. 804 that prohibits the admission of prior testimony when no showing has been made that the declarants are unavailable and which evidentiary rule the Board's own procedural guidelines and regulations make applicable to Board proceedings whenever "practicable." 29 C.F.R. Section 101.10. See also, 29 C.F.R. Section 102.39.

The background to the present controversy is as follows:

(2)

On September 10 and 11, 1981, the Board conducted certification elections (i) in a unit of all full-time and regular part-time truck drivers and yardmen employed at Petitioner New York Propane's Medford, New York location; (ii) in a unit of all full-time and regular part-time mechanics and porters employed by New York Propane at its Farmingdale, New York location; and (iii) in a unit of all full-time and regular part-time office clericals employed at Petitioners GBG's Patchogue, New York location. Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the "Union") was rejected as the bargaining agent by a clear majority at the two New York Propane locations. At the GBG location, out of thirteen eligible voters, five employees voted against the Union and five voted in its favor. The three remaining ballots, sufficient by number to be determinative of the election's outcome, were challenged and not counted in the final tally until after the Board's Order and Directive had issued. (C-2 (n-1); E-1, 2, 3; F)

On September 17, 1981 the Companies and the Union each filed objections to the conduct of the other that allegedly affected the results of all three elections. (E-2)

Upon charges field on August 21, 1981, (H) the Board issued a complaint alleging that the Companies had by their actions in conjunction with the aforementioned elections and other events violated Section 8(a)(1)(3) and (4) of the National Labor Relations Act (29 U.S.C. 158(a)(3) and (4) ). The Companies answered the complaint and denied having engaged in any unfair labor practices or other wrongdoing. (E-2; G)

On June 7, 1982 the hearing before the Board with respect to the First Proceeding commenced to determine and consider (i) whether Petitioner GBG had engaged in unfair labor practices by discharging employees Lorraine Libynski ("Libynski") and Mae Nannery ("Nannery") because of their Union activities and whether the same impacted upon the election; (ii) whether GBG had engaged in unfair labor practices by having one of its employees, who purportedly was a supervisor, interrogate GBG employees regarding their Union activities; and (iii) the respective election challenges mounted below by both the Companies and the Union to the three untallied GBG election votes. During the course of the First Proceeding, the Board's General Counsel moved to consolidate that proceeding with the not yet commenced Second Proceeding. (J-1) The Companies' counsel vigorously opposed the motion on several grounds, including the ground that if the two proceedings were to be consolidated the manner in which the Companies would try the consolidated matter would be far different than the manner in which the First Proceeding had up until that point been tried and the Companies' counsel anticiapted that it would continue to be tried. (J-2, 3, 4) Thus, the ALJ was clearly informed by the Companies' counsel that the latter contemplated immediately reshaping the Companies' defense if the General Counsel's motion was granted but that he would defer until the Second Proceeding from addressing the issues relevant to that proceeding should the General Counsel's motion be denied. The motion was denied.

On October 12, 1982 the Second Proceeding commenced to determine and consider whether two former GBG employees, Wendy Gilner ("Gilner") and Delores Burke ("Burke"), had been discharged for cause or had instead been discharged for their

actual or anticipated testimony in connection with the First Proceeding. At the bginning of the Second Proceeding, the Board's General Counsel moved to "have the transcript, the exhibits, the entire record including the pleadings" of the First Proceeding incorporated into the record of the Second Proceeding for use as the ALJ might see fit in determining the issues in the Second Proceeding. (I-1) The ALJ asked the General Counsel whether his purpose was simply to provide background material and the answer was "No." (*Id.*) Moreover, the General Counsel took the position that the companies had to meet each allegation and each fact raised in both proceedings. (I-2, 3) The motion was granted. As a result of that ruling, and the subsequent rulings which the ALJ made based thereon, counsel for the Companies was repeatedly thwarted from questioning witnesses or introducing documents upon the ground that the desired line of inquiry and presentation raised issues already covered in the First Proceeding. (I-4, 5, 6, 9)

On August 5, 1983 the ALJ issued his decision in the First Proceeding and held that GBG had engaged in unfair labor practices that impacted not only on the representation election at GBG but on the elections at New York Propane as well. Accordingly, the ALJ recommended that the Board order (i) the reinstatement of employees Libynski and Nannery who were found to have been discharged for their Union activities; (ii) that the two representation elections held at New York Propane be set aside and remanded to the Regional Director for further consistent proceedings; and (iii) that the representation election at GBG be reopened to include in the final tally the ballots of the discharged employees and that if such additional ballots should prove not sufficient for a Union victory that the election be set aside and be remanded for the purpose of new elections. (E)

On December 2, 1983 the ALJ issued his decision in the Second Proceeding and held that GBG employees Gilner and Burke had been improperly discharged by GBG because of testimony that the former employee was anticipated to give and the latter did give in the First Proceeding and that those discharges were unfair labor practices in violation of the National Labor Relations Act. The ALJ recommended that the Board order the immedaite reinstatement of the discharged employees. (D)

On June 11, 1985, by its Order and Directive, the Board affirmed the ALJ's rulings, findings and conclusions in the First Proceeding and, with very minor modification, affirmed the ALJ's rulings, findings and conclusions in the Second Proceeding. (C)

On February 6, 1986, pursuant to its Order and Directive, the Board caused the challenged ballots with respect to the representation election at GBG to be recounted and included in the final tally and as a result of such recount certified the Union as the exclusive collective bargaining representative of GBG's full-time and part-time clerical employees. (A-2, 3)

On April 8, 1986 the Board petitioned to the United States Court of Appeals for the Second Circuit for enforcement of the Order and Directive. On August 20, 1986 the United States Court of Appeals for the Second Circuit by Order and Decision enforced the Board's Order and Directive. (B)

(3)

This petition seeks review of that part of the Second Circuit's decision and order of enforcement that found (i) that the Companies were not prejudiced by the ALJ having granted the Board's motion to incorporate the entire record of the hearing with respect to the First proceeding into the record of the hearing with respect to the Second and (ii) that the resulting incorporation of testimony by witnesses who were not unavailable to testify at the hearing of the Second Proceeding did not contravene Fed. R. Evid. 804(b)(1) as "there is no error in the admission of hearsay testimony at administrative hearings . . . ." (B-3)

## REASONS FOR GRANTING THE WRIT

In upholding the Order and Directive, the Court below permitted the Board to abandon its own procedural guidelines that provide, in part, first, that a party to a Board proceeding is entitled to present his case or defense in such manner as allows "for a full and true disclosure of the facts" (29 C.F.R. Sec. 101.10(b) (2) ) and, second, that the proceeding shall be conducted in conformity

with the rules of evidence applicable to the district courts of the United States whenever practicable. (29 C.F.R. Sec. 101.10(a) ) The actions of the Board that were sanctioned by the Second Circuit were not merely violative of the Board's own procedural standards but the due process precepts such standards embody. Moreover, in sanctioning the Board's digression from the rules of evidence applicable to Board proceedings, the Second Circuit has apparently placed itself at odds with other of its sister Circuits that have held that the rules of evidence applicable to Board proceedings are more demanding than those applicable to general administrative proceedings.

(1)

It has been stated again and again, to the point that it has become a maxim with respect to Board Proceedings, that "[d]ue process prohibits the enforcement of a finding by the Board of a violation 'neither charged in the complaint nor litigated at the hearing.' " *Soule Glass and Glazing Co. v. NLRB*, 91 LC para. 12,839, page 17,895 (1st Cir. 1981), citing to *NLRB v. H. Fletcher Co.*, 298 F.2d 594, 600 (1st Cir. 1962); *Boyle's Famous Corned Beef Co. v. NLRB*, 400 F.2d 154, 162 (9th Cir. 1968). It has also been held that a finding of the Board has not been litigated unless it has been fully and fairly litigated. See, *Drug Package Inc. v. NLRB*, 570 F.2d 1340, 1345 (8th Cir. 1978). Furthermore, when evaluating whether an issue has been fully and fairly litigated, the test is not one of formula but rather "one of fairness under the circumstances of each case – whether the employer knew what conduct was in issue and had a fair opportunity to present his defense . . . . " *Soule Glass and Glazing Co.*, *supra*, at page 17,896. In this regard, in determining whether an employer knew what conduct was in issue, and thus had a fair opportunity to present its defense, statements by the employer's counsel that he was operating under the assumption that a certain issue was not embodied in the proceeding is given great weight, especially when that issue is not included in the charges against which the employer defended. *Drug Package Inc. v. NLRB*, *supra*,, 570 F.2d at 1345; *Soule Glass and Glazing Co.*, *supra*, at page 17,916.

Here, the only substantive charges made against the Companies in the Second Proceeding was that they had discharged employees Gilner and Burke for activities protected under the National Labor Relation Act. The Companies defended against these charges, in part, by arguing that Gilner and Burke had been discharged for good cause and, more specifically, for having lied and given contradictory statements as to their employment status. In his decision of December 2, 1983, the ALJ found that in deciding whether employee Gilner was discharged for having lied regarding her actual employment status or for having anticipated in protected activities, Gilner's "belief" as to her status (rather than her actual status) was a crucial factual issue. Gilner's "belief" as to her status was not, however, a factual issue reflected in the charges controlling the Second Proceeding.

Furthermore, the Companies had no genuine opportunity during the course of the Second Proceeding to address (or even stumble into) the issue of Gilner's belief as to her employment status. This is so for two reasons. First, the issue was never directly raised by the Board's General Counsel and was not a point of contention between respective counsel. Second, the ALJ thwarted the Companies' counsel on numerous occasions from developing areas of inquiry that appeared to counsel relevant to the issue of Gilner's supervisory status. The ALJ so thwarted the Companies' efforts on the ground that the desired lines of inquiry had already been pursued in the First Proceeding. Yet, neither the issue of Gilner's belief as to her supervisory status nor any of the substantive charges of the Second Proceeding were litigated within, or of any relevance to, the First Proceeding.

Thus, the Companies' liability in the Second Proceeding as to the discharge of employee Gilner was founded in significant part on the determination of an issue that was never meaningfully litigated and that was not reflected in the charges underlying either of the two proceedings. The Companies were, therefore, denied their right to a fair and full hearing; a denial that the above-cited judicial pronouncements with respect to due process prohibit.

In *NLRB v. Kanmak Mills*, 200 F.2d 542 (3rd Cir. 1952), the original complaint against the emplooyer alleged that the

discharged employee had been refused reinstatement because of her Union activity. Based on the testimony of the employer, counsel for the Board moved to amend the complaint by adding the alternative charge that the discharged employee had been denied reinstatement due to the fact that she had filed charges against the employer. In addition to objecting to the amendment, the employer moved that the hearing be reopened to permit further testimony on the new charge in the event the examiner permitted the complaint to be amended. Although the complaint was amended, the employer's request to reopen the hearing was denied. The Board in its decision upheld the examiner on this point. The Third Circuit found the Board's action erroenous and stated:

> "It is true that the Board and the examiner relied on testimony of the employers' witness, the manager . . . But those reasons cannot foreclose respondents' right under the Administrative Procedure Act, Section 5(a)(b), 5 U.S.C.A. Section 1004, and generally, to be given timely notice of the charge and to have an opportunity to contest it. Section 8(a)(4), alleged in the amendment to have been violated by respondents, specifically concerns discharges based on the employee's filing charges against the employer with the Board or testifying in Board proceedings. It was entirely new to the Petrovich claim. *Respondents were entitled to answer it even though its foundation was the evidence of their own witness which was given in the course of his testimony with reference to the original charge.*" 200 F.2d at 545 (emphasis supplied).

In *Kanmak Mills*, therefore, the Third Circuit held it improper for the Board to thwart an employer's attempt to fully litigate a specific charge leveled against it on the basis that a factual underpinning of the charge had already been presented through earlier testimony when, at the time that the earlier testimony was offered, the charge had not yet been asserted. The Third Circuit's determination was compelled by both logic and fairness. For without the employer knowing, or having some reasonable cause to believe, at the time that evidence is given that the evidence might become the basis for a finding with respect to a particular charge,

there is no genuine opportunity for the employer to further develop, rebut, or in some manner shape the evidence in a manner relevant to that charge.

As in *Kanmak Mills*, so here too it was improper to limit the Companies' ability to address themselves to specific issues on the basis that prior evidentiary submissions offered a basis to determine those issues when, at the time of those earlier submissions, the issues were not at bar and of no significance to the then immediate litigation. It is after all, not the prerogative of the ALJ to speculate as to hwo the earlier submissions might have been strengthened, contradicted or otherwise reshaped if the Companies had been timely informed as to the purposes that such submissions would be put. As the First Circuit has noted in *NLRB v. H. E. Fletcher Co.*, 298 F.2d 599 (1st Cir. 1962):

> "At oral argument petitioner suggested that respondent had the burden of specifically demonstrating how it has been prejudiced by the failure to allege this violation in the complaint. While respondent has not made such a specific showing it has strongly indicated that its case would have been tried differently had it known that this issue was in the case. We believe that, on the present record, it need assent no more in order to be entitled to relief." Id. at 600-01, n. 5.

The general rule as to the right of a litigant involved in Board Proceeding to be given a fair and full opportunity to defend against charges that result in the imposition of significant penalties and unfavorable directives has particular applicability to the present controversy. For as discussed, during the First Proceeding the Board's General Counsel moved to consolidate that proceeding with the yet to be commenced Second Proceeding. After hearing the Companies' counsel argue that he had waged the Companies' defense up until that point under the assumption that the two proceedings, with their significantly different issues, were to be separate and distinct, the General Counsel's motion was denied. The Companies' counsel then went on to complete the Companies' First Proceeding defense holding on to the very reasonable belief that

the issues and proof pertinent to the two proceedings would not be allowed to overlap. Nonetheless, at the beginning of the Second Proceeding, the ALJ granted General Counsel's motion to incorporate the entire record of the First Proceeding, as substantive evidence, into the Second.

Thus, after having been misguided by the ALJ into limiting their First Proceeding defense to the issues germane to that proceeding, the Companies were prevented from developing several, potentially significant, lines of inquiry in the Second Proceeding on the basis that they had been sufficiently developed in the First. This Lewis Carroll scenario is offensive to every notion of fairness and duly administered process of law and if not reversed threatens, apparently in the name and for the sake of administrative expediency, the right to a "full and true disclosure of the facts" that is the Board's stated promise to the Companies and every similarly situated litigant.

(2)

The contradictory rulings of the ALJ that were upheld by the Board in its Order and Directive and sanctioned by the Second Circuit are not merely a blow to basic concepts of due process and the right granted to each employer under the Board's own rules and regulations to fairly and fully defend itself against charges of unfair labor practices, but also to the Board's own applicable rules of evidence.

Rule 804 of the Federal Rules of Evidence requires that in order for testimony given by a witness at another "hearing of the same or a different proceeding" to be admissible it must be shown that (i) the declarant is unavailable as a witness; and (ii) the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination. As no showing was ever made or attempted by the General Counsel as to the unavailability of the declarants whose statements were included in the incorporated record and, as previously discussed, because the Companies neither had the opportunity nor similar motive to develop in the First Proceeding the issues that were crucial to the Second, the ALJ committed, and

the Order and Directive of June 11, 1985 is thus tainted by, reversible error. See *Arth Main Street Drugs v. Beer Distributors of Indiana, Inc.*, 4 Fed. Evid. Rep. 352, 353 (D.C. Ind. 1978) ("This transcript has been offered to prove the truth, in this case, of the statements made by the witness in the Henry County case. It clearly is hearsay barred by Rule 802 of the Federal Rules of Evidence. Plaintiffs have made no assertion and offered no evidence to show that Crimmins is not available to testify").

It is of little weight to the present controversy that the rules of evidence followed by the district courts are imposed on hearings of the National Labor Relations Board not absolutely but only "so far as practicable." 29 C.F.R., Sec. 101.10(a). See, also, 29 C.F.R. Section 102.39. This is so for two reasons. First, no attempt was ever made by the General Counsel to show that the several declarants whose combined testimony comprised a significant part of the First Proceeding record were not in fact available or that recalling those witnesses for purposes of the Second Proceeding was impracticable. Second, the National Labor Relations Board has itself recognized, and has in fact imposed on its own proceedings, a strict "unavailability" test as to the admission of prior statements. Thus, in the recent case of *Union of Operating Engineers*, Local 926, CCH NLRB, para. 17,492 (October 22, 1985), the Board stated at page 30,078:

> In analyzing the allegations regarding employee Hoback the judge allowed into evidence the statement of Ronnie Simmons who did not testify at the trial. The Judge's rationale was that, although it may be inadmissible under the Federal Rules of Evidence, Section 10(b) of the Act gives judges considerable latitude in applying the Federal rules . . . . We disagree. There having been no showing that the Respondent was unable to produce witness Ronnie Simmons at the hearing, we reverse the judge and hold that Simmons' statement constitutes inadmissible evidence under the Federal Rules of Evidence 804(a).

Furthermore, it should be noted that in enforcing the Order and Directive, the Second Circuit has apparently taken a more liberal attitude as to the admissibility of hearsay in Board proceedings than have at least certain other of its sister Circuits. Thus, in enforcing the Order and Directive this Court held "there is no error in the admission of hearsay testimony at administrative hearings, (citation omitted), provided that such evidence bear satisfactory indicia of reliability, (citation omitted)." Although the matter at hand arises out of a hearing before the National Labor Relations Board, the Court supported its holding on two cases involving appeals from proceedings before administrative agencies other than the National Labor Relations Board. The Court thus apparently sought to make the point that in determining whether hearsay was admissible in proceedings before the Board it is the Administrative Procedure Act, with its liberal evidentiary standards, that is to be the guiding standard, see 5 U.S.C. section 556(d), and not the Board's own pertinent rules and regulations. Yet the Ninth Circuit, in one of the very cases relied on by the Second Circuit in its order and decision, has noted that in determining the admissibility of hearsay in Board proceedings, it is not the Administrative Procedure Act but the Board's own rules and regulations (and specifically those which impose on certain Board proceedings the rules of evidence applicable to the district courts whenever practicable), that embody the guiding standard. See, *Calhoun v. Bailer*, 626 F.2d 145, 148, n. 3 (9th Cir. 1980). This apparent conflict between the Circuits further underscores the importance of the instant petition being granted.

## CONCLUSION

For the foregoing reasons, this petition should be granted and a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: Farmingdale, New York
November 18, 1986

Respectfully submitted,

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# APPENDIX

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## Appendix A -
## Complaint and Notice of Hearing, Dated October 3, 1986

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

SYNERGY GAS CORPORATION a/k/a
GLOVER BOTTLED GAS CORP.

and Case No. 29-CA-12585

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

### COMPLAINT AND NOTICE OF HEARING

It having been charged by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, that Synergy Gas Corporation a/k/a Glover Bottled Gas Corp., herein called Respondent, has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151. *et. seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for Region 29, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations - Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. (a) The charge in this proceeding was filed by the Union on August 19, 1986, and served by certified mail upon Respondent on or about August 19, 1986.

(b) The First Amended Charge in this proceeding was filed by the Union on September 26, 1986, and served by certified mail upon Respondent on or about September 26, 1986.

2. On or about February 29, 1984, Respondent, which was then known as Glover Bottled Gas Corp., herein referred to

as Glover, changed its corporate name to Synergy Gas Corporation.

3. At all times material herein Respondent, whether known as Glover or Synergy, is and has been a corporation duly organized under, and existing by virtue of, the law of the State of New York.

4. (a) At all times material herein, Respondent, whether known as Glover or Synergy, has maintained its principal office and place of business at 675 Route 112, in the Town of Patchogue, County of Suffolk and State of New York, where it is, and has been, at all times material herein, engaged in he non retail sale and distribution of propane gas and related products.

(b) During the past year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business, purchased and caused to be transported and delivered to its place of business, propane gas, and other goods and materials valued in excess of $50,000 of which goods and materials valued in excess of $50,000 were delivered to its place of business in interstate commerce directly from states of the United States other than the state in which it is located.

5. Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

6. The Union is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

7. All full-time and regular part-time office clerical employees of Respondent employed at its Patchogue location, exclusive of all temporary employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

8. On or about September 11, 1981, a majority of the employees of Respondent, in the unit described above in paragraph 7, by a secret ballot election conducted under the

supervision of the Regional Director for Region 29 of the National Labor Relations Board designated and selected the Union as their representative for the purposes of collective bargaining with Respondent, and on or about February 6, 1986, the Acting Regional Director for Region 29 certified the Union as the exclusive collective bargaining representative of the employees in said unit, and at all times since said date, the Union, by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all the employees in said unit for the purposes of collecive bargaining.

9. On or about April 9, July 1, July 28 and August 8, 1986, the Union, by letters, requested Respondent to bargain collectively with it as the exclusive collective bargaining representative of Respondent's employees in the unit described above in paragraph 7, with respect to rates of pay, wages, hours of employment and other terms and conditions of employment of such employees.

10. (a) On or about July 1 and August 8, 1986, the Union, by letters, requested Respondent to provide it with the names and addresses of Respondent's employees in the unit described above in paragraph 7.

(b) The information requested by the Union, as described above in subparagraph (a), is necessary for, and relevant to, the Union's performance of its function as the exclusive collective bargaining representative of Respondent's employees in the unit described above in paragraph 7.

11. Since on or about April 9, 1986, Respondent has failed and refused to bargain collectively with the Union as the exclusive collective bargaining representative of Respondent's employees in the unit described above in paragraph 7.

12. Since on or about July 1, 1986, Respondent has failed and refused to furnish to the Union the names and addresses of the employees in the unit described above in paragraph 7, notwithstanding the Union's requests, as described above in paragraph 10.

13. By the acts described above in paragraphs 11 and 12, Respondent interfered with, restrained and coerced, and is interfering with, restraining and coercing, its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

14. By the acts described above in paragraphs 11 and 12, Respondent refused to bargain collectively, and is refusing to bargain collectively, with the representative of its employees, and thereby engaged in, and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a) (5) and Section 2(6) and (7) of the Act.

15. The acts of Respondent described above in paragraphs 11 through 14, occurring in connection with the operations of Respondent described above in paragraphs 2 through 5, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obst_ucting commerce and the free flow of commerce.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs 11 through 14, the General Counsel seeks an order providing that Respondent:

Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps have been taken to comply therewith. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

The General Counsel further prays for such other relief as may be just and proper to remedy the unfair labor practices herein alleged.

PLEASE TAKE NOTICE that on the 20th day of January, 1987 at 9:30 a.m., at 16 Court Street, Fourth Floor, in the Borough of Brooklyn, in the City and State of New York and consecutive days thereafter until concluded, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedures In Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to the said Complaint within fourteen (14) days from the service thereof, and that unless it does so all the allegations in the Complaint shall be deemed to be admitted by it to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

Dated at Brooklyn, New York this 3rd day of October, 1986.

/s/ Alvin P. Blyer

ALVIN P. BLYER
Regional Director
National Labor Relations Board
Region 29
16 Court Street
Brooklyn, New York 11241

## Appendix B - Opinion of the United States Court of Appeals for the Second Circuit, Dated August 20, 1986

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

As a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 20th day of August, one thousand nine hundred and eighty-six.

P R E S E N T:

HONORABLE GEORGE C. PRATT,

HONORABLE ROGER J. MINER,

Circuit Judges,

HONORABLE EDWARD D. RE,

Chief Judge of the United States Court of International Trade, sitting by designation.

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

— against —

GLOVER BOTTLED GAS CORPORATION, SYNERGY GROUP, INC., NEW YORK PROPANE CORPORATION, and VOGEL'S INC.,

Respondents.

- - - - - - - - - - - - - - - - - - - - - - - - x

No. 86-4038

An application of the National Labor Relations Board ("Board"), pursuant to 29 U.S.C. § 160(e) (1982), for enforcement of an order directing respondents, *inter alia*, to cease and desist from interfering in, restraining or coercing employees in the exercise of their rights to engage in union activities and to offer reinstatement and back pay to unlawfully discharged employees came on to be heard on the transcript of record and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered that the order of the Board is enforced.

The Board, on the basis of facts gleaned before an administrative law judge ("ALJ") in two separate hearings, found that respondents had violated subsections 8(a)(1), (3), and (4) of the National Labor Relations Act, *id.* § 158(a)(1), (3), and (4), by discharging employees for their union-organizing efforts, by coercively interrogating employees about these activities in anticipation of the hearings, and by discharging two persons – whom respondents had classified as supervisors – because of their actual or anticipated testimony at the first hearing.

Respondents urge numerous grounds for denying the Board's application for enforcement, none of which has merit.

1. Repondents argue that the ALJ and Board erred in failing to consider respondents' evidence in support of their affirmative defense that they would have taken the same action against the discharged employees even in the absence of their union activities. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-02 (1983). To the contrary, the record reveals that the Board did indeed consider respondents' evidence, but dismissed it as tending to show the existence of a pretext for respondents' unlawful conduct rather that an affirmative defense. We affirm the Board's conclusion, because it resulted from reasonable credibility determinations made by the ALJ and accepted by the Board, *see NLRB v. J. Coty Messenger Service, Inc.*, 763 F.2d 92, 96 (2d Cir. 1985), and is supported by substantial evidence on the record as a whole, *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

2. Respondents contend they were denied their rights to due process when the ALJ granted the Board's motion and incorporated the entire record of the first hearing into the record of the second. In particular, respondents claim that the incorporation of testimony from witnesses who were not unavailable to testify at the second hearing contravened Fed. R. Evid. 804(b)(1). However, there is no error in the admission of hearsay testimony at administrative hearings, *see Marvin Tragash Co. v. Department of Agriculture*, 524 F.2d 1255, 1258 (5th Cir. 1975), provided that such evidence bear satisfactory indicia of reliability, *see Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 3033 (1981). In any event, respondents have demonstrated no prejudice resulting from the procedure adopted by the ALJ.

3. Respondents argue that the ALJ's bias against them, as reflected primarily in his credibility determinations, requires a denial of enforcement of the Board's order. Credibility findings are the province of the trier of fact. *See NLRB v. Independent Ass'n of Steel Fabricators, Inc.*, 582 F.2d 135, 151 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979). We find that the ALJ's credibility determinations were supported by substantial evidence. Moreover, considering that the ALJ found in favor of respondents on a number of alleged violations of the Act, we find that the record fails to reflect any unfair bias that might have operated to respondents' detriment.

4. We have carefully considered respondents' other arguments on appeal and find them to be without merit.



s/George C. Pratt
George C. Pratt, U.S.C.J.

s/Roger J. Miner
Roger J. Miner, U.S.C.J.

s/Edward C. Re
Edward C. Re, U.S.C.I.T.

## Appendix C -
## ecision, Order and Direction of Second Election, Before the National Labor Relations Board, Dated June 11, 1985

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GLOVER BOTTLED GAS CORP.

and Cases 29--CA--9116
29--RC--5495

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and Case 29--CA--9764

WENDY GILNER, an Individual

NEW YORK PROPANE CORP. Cases 29--RC--5493
29--RC--5494

GLOVER BOTTLED GAS CORP., VOGEL'S INC., NEW YORK PROPANE CORP., SYNERGY GROUP, INC. Case 29--CA--9811

and

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

## DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On 5 August 1983 Administrative Law Judge D. Barry Morris issued the attached decision in Case 29--CA--9116.[1] The Respondent filed exceptions and a supporting brief.

On 2 December 1983 Judge Morris the attached decsion in Case 29--CA--9764.[2] The Respondent filed exceptions and a brief.

On 10 September 1984 the Board remanded the above-entitled proceedings to Judge Morris in order that he might further consider certain credibility resolutions.[3] The General Counsel filed a brief on remand to the judge. On 29 November 1984 Judge Morris issued the attached supplemental decision. The Respondent filed exceptions and a brief.

The Board has considered the decisions and the records in light of the exceptions and briefs and has decided to affirm the judge's

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[1]This set of cases includes Cases 29--CA--9116, 29--RC--5493, 29--RC--5494, and 29--RC--5495. Case 29--RC--5493 concerns the 10 September 1981 election conducted at New York Propane Corp., located in Medford, New York; Case 29--RC--5494 concerns the 11 September 1981 election conducted at New York Propane Corp., located in Farmingdale, New York; and Case 29--RC--5495 concerns the 11 September 1981 election conducted at Glover Bottled Gas Corp., located in Patchogue, New York.

[2] This set of cases included Cases 29--CA--9764 and 29--CA--9811.

[3] The Board notes that these cases have been consolidated for considerations of economy and efficiency and because the cases have related issues.

rulings,[4] findings,[5] and conclusions[6] in Cases 29--CA--9116, 29--RC--5493, 29--RC--5494, and 29--RC--5495; the judge's rulings, findings, and conclusions in Cases 29--CA--9764 and 29--CA--9811, as modified;[7] and the judge's supplemental decision, and to adopt the recommended Orders.[8]

## ORDER

The National Labor Relations Board adopts the recommended Orders of the administrative law judge and orders that the Respondents, Glover Bottled Gas Corporation, Synergy Group, Inc., New York Propane Corporation, and Vogel's Inc., Medford, Farmingdale, and Patchoque, New York, their officers, agents, succesors, and assigns, shall take the action set forth in the Orders.

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[4] Chairman Dotson notes that in finding that the employee interrogations, conducted by the Respondent's attorneys on 4 June 1983, to be a violation of Sec. 8(a)(1) he has looked to the totality of the circumstances, including but not limited to the fact that the employees questioned knew that Wendy Gilner had been interrogated by the Respondent's attorneys the night of 3 June and that she had been fired the morning of 4 June. *Anserphone, Inc. v. NLRB*, 632 F.2d 4 (6th Cir. 1980). See also *Retired Persons Pharmacy v. NLRB*, 519 F. 2d 486 (2d Cir. 1975).

[5] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[6] In adopting the judge's findings that Supervisor Burke's repeated questioning of employees Nannery and Purchia violated Sec. 8(a)(1) of the Act, we have applied the rationale set forth in *Rossmore House*, 269 NLRB 1176 (1984).

[7] Inasmuch as the Respondent's discharge of Supervisors Gilner and Burke independently violated Sec. 8(a)(1) of the Act, we find it unnecessary to consider whether the Respondent's conduct also violated Sec. 8(a)(4). See *Amason, Inc.*, 269 NLRB 750 (1984), see fn. 2 and cases cited therein. In reaching this decision, we do not find it necessary to rely on the judge's citation of *General Nutrition Center*, 221 NLRB 850 (1975).

[8] In adopting the judge's recommendation that the elections be set aside in Cases 29--RC--5493 and 29--RC--5494, we note that two of Glover Bottled Gas Corp.'s

*(footnote continued)*

IT IS FURTHER ORDERED that the elections conducted on 10 and 11 September 1981 in Cases 29--RC--5493 and 29--RC--5494 be set aside and these cases are severed and remanded to the Regional Director for Region 29 for the purpose of scheduling and conducting a second election in each case at such time as he deems the circumstances permit a free choice in the issue of representation.

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employees credibly testified that before the election they told employees at the Medford and Farmingdale facilities that Lorraine Libynski and Mae Nannery were fired. An employee at the Medford facility credibly testified that he knew before the election that Libynski and Nannery had been fired.

William Kampe, the assistant shop steward at Glover Bottled Gas, testified:

> Q. Did you have occasion to make any comments to the employees at Medford about the discharges of Mae Nannery of Lorraine Libynski?
>
> A. They were pretty aware of it. You know, they knew when it happened, and they . . . .
>
> JUDGE MORRIS: How do you know that they were aware of it?
>
> THE WITNESS: They told me. They said we understand Mae and Lorriane were fired, and this and that. We discussed it.
>
> . . . .
>
> Q. [D]id you speak to those employees at Farmingdale, the mechanics and the porters, about Lorriane Libynski?
>
> A. Yes. They knew Lorraine. She had worked in Farmingdale previously.
>
> . . . .
>
> JUDGE MORRIS: What did you tell them?
>
> THE WITNESS: I said that two girls had been discharged over at Glover for what I---all I could see of it was because of Union activity.

Thus, the employees at Medford and Farmingdale had knowledge of the Respondent's unlawful conduct of discharging employees Mae Nannery and Lorraine Libynski. Therefore, the Union's Objection 2, which relates to the allegations of unfair labor practices in Case 29--CA--9116, will be sustained in Cases 29--RC--5493 and 29--RC--5494.

IT IS FURTHER ORDERED that Case 29--RC--5495 be severed from this consolidated complaint and remanded to the Regional Director; that the ballots of the employees found herein to be valid be opened and counted by the Regional Director in accordance with the Board's Rules and Regulations and a revised tally of ballots issued and served on the parties. In the event the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue the appropriate certification of representative. In the event the Petitioner has not received a majority of the valid ballots cast,

IT IS ORDERED that the election conducted on 11 September 1981 be set aside. The Regional Director shall conduct a new election when, in his discretion, a fair and free election can be held.

## DIRECTION OF SECOND ELECTIONS

Second elections by secret ballot shall be held among the employees in the units found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the elections, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Elections, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1256 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an election eligibility lists containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Elections. The Regional Director shall make the lists available to all parties to the elections. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the elections if proper objections are filed.

Dated, Washington, D.C. 11 June 1985

s/ Donald L. Dotson

Donald L. Dotson, Chairman

s/ Robert P. Hunter

Robert P. Hunter, Member

s/ Patricia Diaz Dennis

Patricia Diaz Dennis, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## Appendix D - Decision of the National Labor Relations Board, Dated December 2, 1983

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
NEW YORK, NEW YORK

GLOVER BOTTLED GAS CORP.

and Case Nos. 29-CA-9764
29-CA-9811

WENDY GILNER, An Individual

GLOVER BOTTLED GAS CORP.,
VOGEL'S, INC.
NEW YORK PROPANE CORP.,
SYNERGY GROUP, INC.

and

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

WILLIAM SHUZMAN, ESQ.,
Brooklyn, NY, for the
General Counsel
ROBERT C. GOTTLIEB, ESQ.
Carle Place, NY, for
Gilner
DANIEL SHIENTAG, ESQ.,
Farmingdale, NY, for the
Respondents.

### DECISION

#### Statement of the Case

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in New York City on various dates beginning October 12, 1982 and ending February 14, 1983. Upon charges

filed on June 15 and June 30, 1982, [1] complaints were issued on July 23 and August 13, alleging that Glover Bottled Gas Corp. ("Respondent" or "GBG") violated Section 8(a)(1) and (4) of the National Labor Relations Act, as amended (the "Act"). Respondent filed answers denying the commission of the alleged unfair labor practices.

The instant proceeding is an outgrowth of cases which I heard in the summer and fall of 1982. [2] The complaints allege that Respondent discharged Gilner on June 4 because of her anticipated testimony in Case Nos. 29-CA-9116 et al. and that Respondent discharged Dolores Burke on June 25 because of her just completed testimony in those cases. Respondent admits that Gilner was discharged because of her anticipated testimony and that Burke was discharged because of her actual testimony. Respondent contends, however, that the employees were discharged because they lied.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. A brief was filed by counsel for Respondent.

Upon the entire record of the case, including my observation of the witnesses, I make the following.

## Findings of Fact

### I. The Business of Respondents

GBG, a New York corporation, with its principal office and place of business in Patchogue, New York, is engaged in the sale

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[1] All dates refer to 1982 unless otherwise specified.

[2] *Glover Bottled Gas Corp. and Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, Case Nos. 29-CA-9116, 29-RC-5493, 29-RC-5494, 29-RC-5495. Decision issued August 5, 1983 (JD-(NY)-74-83) (the "prior proceeding"). Pursuant to General Counsel's motion made at the commencement of the proceeding, the record of the prior proceeding was incorporated into the record of the instant proceeding. See *Plant City Welding and Tank Company*, 123 NLRB 1146, 1150 (1959), reversed on other grounds, 133 NLRB 1092 (1961).

and distribution of propane gas and related products. During the 12 months preceding the issuance of the complaints, Respondent purchased goods and materials valued in excess of $50,000 from suppliers located outside New York State. As found in the prior proceeding, Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. As further found in the prior proceeding, GBG, Synergy Group, Inc., New York Propane Corp. and Vogel's Inc. constitute a single integrated business enterprise and a single employer, engaged in commerce within the meaning of the Act.

## II. The Labor Organization Involved

Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (the "Union"), is a labor organization within the meaning of Section 2(5) of the Act.

## III. Wendy Gilner

Gilner was asked to attend a meeting on June 3 with Respondents' counsel, Daniel Shientag and Diane Geller. There is virtually no dispute as to what Gilner said at the meeting. Gilner credibly testified that she was presently supervisor of customer service and that she had held that position since July 1981. She stated that she had gotten the position through Joel Garey, Vice President of Long Island Operations. When questioned about Mae Nannery, a subject of the prior proceeding, she answered that Trypaulik, Gilner stated that she "found her to be cooperative and helpful in what she did". When asked about Mary Trypaulik, also a subject of the prior proceeding, she answered that Trypaulik was supervisor of credit and collections, "that she had that position unwillingly", and that "Mary Trypaulik was given that position around the time I was given my supervisory position, so that she would be unable to vote in the union election". Gilner further testified:

> In the course of discussing Mary Trypaulik, I explained that she had become the supervisor of credit and collections without her willingness, that the company was placing her in the position of accepting the supervisory position so that she would be ineligible to vote, and that they had also given her a 50 cent raise at the time to make her completely ineligible to vote.

Gilner also testified that at the meeting with Respondent's counsel, she explained to Shientag that "although I was a supervisor by title, my authority had been lessened so that I would be eligible to vote, even though I was maintaining the same duties in September of '81 that I did in July of '81". She further testified, as follows:

Q. Who told you this?
A. Joel Garey.

Q. You told this to Mr. Shientag?
A. Yes I did .... I explained further about the conversation that I had with Joel Garey in reference to the fact aht I was unhappy about not getting the raise and not being allowed to go back to my previous desk of handling customer service. At which point Mr. Sheintag asked me to explain about Mr. Garey and our discussion. And I explained that Mr. Garey and I had originally started our conversation in the office of Glover Gas, and at one point, Mr. Garey had asked if we could move it out to the yard of Glover, where it would be a little mroe private. At which point he was, Mr. Garey, was going to attempt to explain to me why I was not getting the raise and why Marty Trypaulik was.

Q. And did you tell him what Mr. Garey and you had discussed out in the yard on that day?
A. Yes.

Q. Could you tell us what you told Mr. Shientag?
A. Yes. Once again, I had explained the fact about I was doing a supervisory position and I felt I should get the raise. Mr. Garey stated he couldn't give it because by giving me a raise that would make me ineligible to vote, and he wanted me to be eligible to vote in the union. And the purpose of giving Mary Trypaulik the raise and making her a supervisor, was so that she would be ineligible to vote, even though he knew she didn't really want the position, they were forcing it on her anyway. At which point, Joel Garey had expressed to me the reason that Mae Nannery and Lorraine Libynski were no longer with the corporation was because of their union activities and that Mr. Garey did not want Mae Nannery nor Lorraine Libynski recruiting the other women into unionizing. . . .

Geller testified that after the interview with Gilner, she and Shientag discussed the situation and concluded that Gilner should be terminated. Geller testified that she and Shientag considered some of Gilner's statements to be lies which would "hurt the company in the upcoming NLRB trial". Geller testified that she called Bill Sheridan, the office manager, that evening, and told him that a decision had been reached to terminate Gilner.

At approximately 8 a.m. on June 4, when Gilner reported for work, she was met by Heyum. Heyum told Gilner that he had been called by Geller the prior evening and stated that "he was to be in work even before I was able to punch in and that he was to pull my time card and to terminate me". When Gilner asked Heyum why she was being terminated, he replied that he didn't know, "that he tried to ask Miss Geller why and he was once again told not worry about it, that I was just to be terminated and that he did not know why I was being terminated".

A. Gilner's Supervisory Status

In the record of this proceeding as well as in the record of the prior proceeding there is much conflicting evidence as to

whether Gilner was a supervisor. Both General Counsel and counsel for Respondent state that it is immaterial, for the purpose of this proceeding, to determine whether or not Gilner was, in fact, a supervisor, within the meaning of the Act. Instead, I believe that what is necessary to determine, as whether Gilner believed herself to be a supervisor and accordingly, whether her statement to Shientag and Gellar that she was a supervisor was a lie.

Gilner credibly testified that at the end of June 1981 Garey asked her to become supervisor of customer representatives. There was to be a four-week trial period in the new position. Gilner further credibly testified that Sheridan advised the employees in the customer service department of the new arrangement. That Gilner believed she had some supervisory authority is evidenced by several exhibits in the record. Thus C.P. Ex. 4E is a memo to one of the customer service representatives which states, "Effective immediately every Friday prior to leaving work, a backlog must be submitted to me". C.P. Ex 4T, which is a memo addressed to all customer service representatives, states, "Effective immediately a daily operations log is to be turned into me at the end of your work day. It is to include your current backlog". C.P. Ex. 4V, a memo to all employees, states, "You must take a lunch during the course of a day. You will be docked the ½ hour unless you have prior approval".

In addition, in the prior proceeding, Burke credibly testified that Gilner, as Sheridan's assistant, was "over the girls in the service department". Burke stated that Gilner "was acting as their supervisor" and "assigned tasks to the girls". Similarly, Trypaulik credibly testified in the prior proceeding that Gilner was Sheridan's assistant, "but as his assistant, she had certain things . . . he told her she could reprimand certain people, and stuff like that".

B. September 1981 Affidavit

G.C. Ex. 2 is an affidavit executive by Gilner on September 29, 1981 with respect to a state court matter involving a claim against GBG. Among the statements Gilner subscribed to in the

affidavit was the following, "I am not a supervisor or manager of any department at Glover Bottled Gas Corp.".

Gilner credibly testified that on approximately September 24, 1981 she received a draft of the affidavit through inter-office mail. She then telephoned Geller telling Geller that she did not believe the statement was true inasmuch as it stated she was not a supervisor. Geller replied that it was necessary for such a statement to be in the affidavit because the company was attempting to prove that Gilner should not have signed for a summons involving a claim against GBG. Gilner told Geller that she would like to take the draft home and think about it.

Gilner further credibly testified that she took the affidavit home and discussed it with her sister, Victoria, who had just graduated law school. Wendy told her sister that she was "uncomfortable" with the affidavit because "I knew a portion of it was false". Wendy and her sister made certain revisions to the affidavit. The next day Wendy telephoned Geller and told her the changes she would like to have made. Wendy credibly testified as follows:

> [Geller] told me again that the changes couldn't be done because that . . . wouldn't be doing the company any good, what they were trying to do was prove that I had no authority to sign for the summons, and by removing the fact that I was a supervisor, would make me eligible to sign for this summons. And that Diane Geller was expressing to me that what she would like to do is just settle the case with Suffolk County Brake out of court, that it was nothing more than an unpaid bill, I think she told me $1800, and it was nothing more than a formality, and she really didn't understand why there was such a problem.

Wendy was still uncomfortable in signing the affidavit and the next day Geller again telephoned her asking when she would sign it. Wendy again told Geller that she was uncomfortable with

the affidavit and "that I didn't really feel it was true and I just didn't like signing it". After Geller reassured her that it was "nothing more than a formality", Wendy signed the affidavit. Wendy testified, as follows:

> Q. Why did you sign a statement containing a lie in it?
> A. I felt I had no other choice.
>
> Q. When you say you felt you had no other choice, what do you mean?
> A. I was asked to sign it, I suggested changes, and I was still being asked to sign it, despite the fact that both parties involved knew it was untrue, and I was just being called to sign it and sent it in. My adjustments weren't being met. And finally after, you know, being told that it's just a formality, I signed it . . . .
>
> Q. What would happen if you didn't sign it?
> A. I don't know but I suppose the fear is always there of losing your job. . . .

Victoria corroborated her sister's testimony. She credibly testified that Wendy brought home the affidavit and told her that she was asked by Respondent to sign it. Victoria asked Wendy if the statement was true and Wendy replied that it was not. Victoria testified that Wendy said she was a supervisor and that the affidavit was false inasmuch as it stated that she was not a supervisor. Victoria made certain changes to the affidavit and suggested that Wendy submit the changes to Respondent. Victoria credibly testified, as follows:

> Q. And do you know what your sister did with that piece of paper?
> A. She indicated to me that she took it in and they refused to make the corrections I suggested.
>
> Q. When did she tell you that?
> A. The next night, I believe it was. It was within the next day or two.

Q. And at that time, did you have any further discussions about that affidavit . . . ?
A. When she told me that they weren't going to take my suggestions, she told me that they were putting pressure on her to sign this one.

Q. Did she say who they were?
A. Diane Geller.

Q. And did you give her any further instructions?
A. I told her not to sign it again, but she was frightened.

Q. How do you know she was frightened?
A. During the conversation, it was quite obvious from the way she was behaving and the way she was talking to me, that she was concerned that she was going to lose her job if she didn't sign it.

Geller testified that Wendy had "some problems" with the affidavit. She testified that Wendy had "pencilled in some changes that she felt were necessary in order for her to feel comfortable signing this affidavit". With respect to the statement in the affidavit that she was not a supervisor, Geller testified that she questioned Wendy as to whether she was able to hire and fire, discipline employees, give raises, etc. While Geller subsequently testified that Wendy did not have a problem with the word "supervisor", when she was questioned as to why she asked Wendy specific questions as to her supervisory authority, Geller retracted her earlier testimony and stated that Wendy "must have indicated" a problem with the statement that she was not a supervisor. Geller further testified that at the June 3, 1982 meeting with Shientag, herself and Wendy, both she and Shientag did not ask Wendy any questions about the September 1981 affidavit. Geller further testified that during the discussion she had with Shientag after Wendy left the interview, Shientag did not mention the September 1981 affidavit. Geller conceded that Wendy was discharged because of what she told Shientag and herself at the interview.

C. Conclusions

I find that Wendy Gilner was discharged because Shientag and Geller believed that her anticipated testimony would be harmful to Respondents' case. Gilner told Shientag and Geller at the interview that Nannery was a cooperative employee, that Trypaulik was given a supervisory position so that she would not be able to vote and that Garey told her that Nannery and Libynski were terminated because of their Union activities. These statements, if testified to, would obviously be damaging to Respondents' case. In my opinion Respondents' contention that Gilner was discharged because of lying is a mere pretext. I have credited Gilner's testimony that Garey told her that Nannery and Libynski were terminated because of their Union activities and I have found in the prior proceeding that, in fact, Nannery and Libynski were terminated because of their Union activities.

With respect to Gilner's supervisory status, I find that Gilner honestly believed that she was a supervisor. Geller was aware of this belief as early as September 1981 and urged Gilner to sign the affidavit which stated that she was not a supervisor, even though Geller knew that Gilner believed that she was a supervisor. Gilner signed the affidavit, although uncomfortable doing so, and against the advice of her sister, because she feared the possibility of losing her job if she did not sign it. Under these circumstances, I believe that Gilner did not lie concerning what she believed to be her supervisory status. I conclude that she was discharged because Respondents' counsel believed that her anticipated testimony would be harmful to Respondents. Geller recognized this when she testified that Gilner's story "certainly was detrimental to the company case, and certaintly [was] detrimental to the company".

IV. Dolores Burke

Dolores Burke testified in the prior proceeding on June 21, 23 and 24. She was discharged by GBG on June 25. In the prior proceeding Burke testified that during July 1981 she called Garey and told him that Nannery, Libynski and Trypaulik were "unionizing'. She further testified that in a subsequent conversation she told

Garey "the girls are really giving me a hard time, I don't know what's going on. He said to me, don't worry about it they're getting terminated anyway". With respesct to Nannery's obtaining provisions at the 7-Eleven without punching out, Burke testified that she gave Nannery permission to do so. Burke also testified that in February 1981 Garey approached her and told her that a new sales department was opening and offered her the position of sales manager. She testified that she accepted the position as sales manager supervising two employees, Nannery and Purchia. She stated that she retained the same authority in her position as sales manager as she had as office manager.

Burke further testified in the prior proceeding, as follows:

> Joel Garey . . . told me that Diane Geller just received a letter from the Labor Board stating that Mae Nannery was pressing charges because I was fully aware of the unionizing before she got fired. Joel Garey then told me I want you to tell the Labor Board that you thought they were kidding and you are not management.

In addition, Burke corroborated Trypaulik's testimony that Trypaulik was not a supervisor. Burke testified that during a management meeting Trypaulik said, "I prefer not to be here, I'm not a manager, and you know I'm not a manager, and Joel Garey excused her". Finally, with respect to the June 4 interview of Burke by Shientag and Geller, Burke testified that she asked Geller whether she would be asked any questions and Geller replied, "No, we're not asking you any questions". Burke further testified that on June 3 she was not told that her appearance the following day was voluntary.

A. Meeting with Geller in September 1981

Burke credibly testified that on September 17, 1981 Garey told her that Geller received a letter from the NLRB stating that Nannery was pressing charges against Respondent because Burke had knowledge of Nannary's Union activities. Garey told Burke, "I want you to tell the Labor Board that you're not management and you're only a senior clerk". On September 22, 1981 Geller interviewed Burke, at which time Garey was also present. Geller

asked her if Nannery's statement to the Board was true, to which Burke replied that it was. When asked by Geller whether she ever handed out work, hired, fired or disciplined employees, she answered no. She testified at this proceeding that her answers to Geller with respect to handling out work and disciplining employees, were false. As to why she lied at the September 22 interview, she testified, "I answered the questions according to the way Joel Garey had told me". She further testified, as follows:

Q. Now September 1981, you had a certain conversation with Miss Geller, Mr. Dipple and Mr. Garey, correct?
A. Just Diane Geller was the only one who spoke. George Dipple and Joel Garey did not speak.

Q. They were present thought?
A. Yes.

Q. And you answered certain questions posed to you by Diane Geller, correct?
A. That's correct.

Q. And you answered them incorrectly?
A. That's correct.

Q. Why?
A. Because Joel Garey had asked me to tell the Labor Board that I was not management and I told Diane Geller. She knew my position with the company, she knew my duties, and I felt I was just answering them the way Joel Garey had asked me to answer.

Burke testified that she "knew" she "would be fired" if she told Geller the truth during the September 1981 interview. At the prior proceeding she testified that she lied at the September 1981 interview because she felt "intimmidated" and "very nervous and afraid".

Geller corroborated Burke's testimony that Garey was present during the September 1981 interview and that when asked whether she had the right to hire, fire or suspend employees, or to assign work to employees, Burke answered that she did not have the authority. Geller testified that upon the completion of Burke's testimony at the prior proceeding she recommended to Shientag that Burke be discharged. Geller testified that Burke was discharged the day after she completed her testimony for "lying on the stand".

## B. Conclusions

In their Brief, Respondents contend that Burke was discharged "because she had, in the course of her testimony, in Cases 29-CA-9116, et al., stated that in or about September 1981, she had wilfully lied to Glover's counsel concerning her employment by Glover during the summer of 1981" (Br. p. 2). At the hearing in the instant proceeding Geller testified that Burke was discharged for "lying on the stand" during her testimony in the prior proceeding. I have credited Burke's testimony and find that she told the truth in the instant proceeding with respect to her supervisory status and with respect to her discussion with Garey on September 17, 1981. While I find that Burke lied to Geller during the September 1981 interview, I also find that she did so because she was so instructed by Garey. I believe that Burke was discharged because her testimony in the prior proceeding was detrimental to Respondents' case. Thus, she testified that she was a supervisor and corroborated Nannery's testimony that she questioned Nannery concerning her Union activities. Burke also testified in the prior proceeding that Garey told her, concerning several employees who had been engaged in Union activities, "don't worry about it, they're getting terminated anyway". Burke also testified in the prior proceeding that Garey instructed her to tell the Board that she was not management. In addition, Burke testified at the prior proceeding that Trypualik stated "I'm not a manager, you know I'm not a manager". Finally, Burke testified that on June 3 she was not told that her appearance the following day with Shientag and Geller was voluntary.

V. Discussion and Analysis

As stated by the Board in *Power Systems, Inc.*, 239 NLRB 445, 447 (1978), enforcement denied on other grounds, 601 F.2d 936 (7th Cir. 1979):

> The broad language contained in Section 8(a)(4) has been interpreted as being "consistent . . . with an intention to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses. . . . The Board has consistently given an expansive scope to the protections afforded by Section 8(a)(4), thereby confirming the crucial importance of that section to the effective operatins of the National Labaor Relations Act.[3]

In *Big Three Industrial Gas & Equipment Co.*, 212 NLRB 800 (1974), enfd. 512 F.2d 1404 (5th Cir. 1975), the Board found that an employee's discharge violated the Act even though that employee testified falsely in certain respects at a Board hearing. The Board affirmed an Administrative Law Judge's decision which stated, in pertinent part (*Id.* at 803):

> [T]he cases . . . compel a construction of Section 8(a)(4) which would place the burden on the employer to show affirmatively not only that the testimony was false, but also that it was willingly and knowingly false, that it was uttered with intent to deceive, and that it related to a substantial issue. In effect, the employer would have the burden of establishing perjury.

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[3] The Board has found that Section 8(a)(4) protects not only employees, *Everage Brothers Market, Inc.*, 206 NLRB 593 (1973), but supervisors, as well. *General Nutrition Center, Inc.*, 221 NLRB 850, 858 (1975); *Power Systems, Inc.*, *id.*,

As the Administrative Law Judge's decision further stated (*Id.* at 804), " 'An essential element of the crime of perjury is a showing that the witness did not believe his statements to be true.' *United States v. Hagarty*, 388 F.2d 713 (C.A. 7 1968). 'It is the belief of the individual in the verity of his sworn testimony that is crucial.' *United States v. Winter*, 348 F.2d 204, 210 (C.A. 2, 1965)".

From the above citations it is clear that Section 8(a)(4) is to be construed liberally, that it applies to supervisors as well as to employees, and that it protects even false testimony so long as such testimony was not willingly and knowingly false and was not uttered with intent to deceive. With these criteria in mind, I turn to an examination of the circumstances surrounding the discharges of Gilner and Burke.

A. Gilner

I have credited Gilner's testimony that Garey told her that Nannery and Libynski were terminated because of their Union activities. I have also credited Gilner's testimony that Garey asked her to be supervisor of customer representatives on a four-week trial basis. I find that Gilner believed that she was a supervisor and acted consistently with that belief. The fact that she had signed an affidavit in September 1981 stating that she was not a supervisor was done under protest. She advised Geller that she was a supervisor and did not want to sign the affidavit unless it was changed. She was told by Geller that the affidavit was a mere "formality" and Gilner felt that she risked losing her job if she did not sign it. Under such circumstances, I do not believe that the signing of the affidavit can be held against Gilner and in any way intimates that she changed her belief that she was a supervisor. Respondents have not sustained their burden of showing that Gilner's testimony was willingly and knowingly false and that it was uttered with intent to deceive. Accordingly, I find that Respondents discharged Gilner because of her anticipated testimony, in violation of Section 8(a)(4) and (1) of the Act.

B. Burke

I have credited Burke's testimony that Garey told her to tell the Board that she was not part of management, but was only a senior

clerk. I find that Burke was discharged for her testimony at the hearing. Indeed, Geller testified that Burke was discharged for "lying on the stand". While Respondents contend, in their Brief, that Burke was also discharged for having lied to Geller in September 1981, she did so because she was so instructed by Garey. Garey was present at the September 1981 meeting and knew very well that Burke was a supervisor but that he told her to say that she was not. I find that Burke was discharged for her testimony in the prior proceeding and that Respondents' contention that she was discharged for lying is pretextual. I find that Respondents have not sustained their burden of showing that Burke's testimony was willingly and knowingly false and that it was uttered with intent to decieve. Accordingly, I find that Burke was discharged because of her testimony, in violation of Section 8(a)(4) and (1) of the Act.

## Conclusions of Law

1. Glover Bottled Gas Corp., Synergy Group, Inc., New York Propane Corp. and Vogel's Inc., constitute a single integrated business enterprise and a single employer, engaged in commerce, within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Wendy Gilner because of her anticipated testimony and Dolores Burke because of her actual testimony under the Act, Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(4) and (1) of the Act.

## The Remedy

Having found that Respondents have engaged in certain unfair labor practices, I find it necessary to order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondents having discharged Wendy Gilner and Dolores Burke in violation of the Act, I find it necessary to order

Respondents to offer them full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings that they may have suffered from the time of their termination to the date of Respondents' offers of reinstatement. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[4]

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[5]

ORDER

Respondents, Glover Bottled Gas Corp., Synergy Group, Inc., New York Propane Corp. and Vogel's Inc., their officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because of thier testimony or anticipated testimony under the Act.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights under Section 1 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

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[4]See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

[5]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Offer Wendy Gilner and Dolores Burke immediate and full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, in the manner set forth above in the section entitled "The Remedy."

(b) Preserve and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Expunge from their files any references to the discharges of Wendy Gilner and Dolores Burke on or about June 4 and 25, 1982, respectively, and notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

(d) Post at their facilities copies of the attached notice marked "Appendix." [6] Copies of the notice on forms provided by the Regional Director for Region 29, after being duly signed by Respondents' authorized representatives shall be posted by Respondents immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonably steps shall be taken by Respondents to insure that the notices are not altered, defaced, or covered by and other material.

(e) Notify the Regional Director for Region 29, in writing,

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[6]In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

within 20 days of the date of this Order, what steps the Respondents have taken to comply herewith.

Dated, Washington, D.C. December 2, 1983.

s/ D. Barry Morris

D. BARRY MORRIS
Administrative Law Judge

## Appendix E -
## Decision of the National Labor Relations Board, Dated August 5, 198

JD-(NY)-74-83
Patchogue, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
NEW YORK, NEW YORK

GLOVER BOTTLED GAS CORP.

and

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

*James L. Castagna, Esq.* and
*William Shuzman, Esq.*,
Brooklyn, NY, for the
General Counsel.
*Bryan C. McCarthy, Esq.* (*O'Connor & Mangan*),
Long Island City, NY, for the
Charging Party.
*Daviel M. Shientag, Esq.* and
*Diane Geller, Esq.*, Farmingdale, NY,
for the Respondent.

Cases 29 – CA – 9116
29 – RC – 5493
29 – RC – 5494
29 – RC – 5495

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### DECISION

#### Statement of the Case

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in New York City on various dates beginning

June 7, 1982 and ending October 12, 1982. Upon a charge filed on August 21, 1981[1] a complaint was issued on October 23 alleging that Glover Bottled Gas Corp. ("Respondent" or "GBG") violated Section 8(a)(1), (3) and (4) of the National Labor Relations Act, as amended ("the Act"). Respondent filed an answer denying the commission of the alleged unfair labor practices.

Upon petitions filed by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union") on July 23 and 24, 1981 and pursuant to Stipulations for Certification Upon Consent Election, elections were held on September 10 in a unit of all full-time and regular part-time truck drivers and yardmen of New York Propane Corp. ("NYP") employed at its Medford location (Case No. 29-RC-5493); on September 11 in a unit of all full-time and regular part-time mechanics and porters of NYP employed at its Farmingdale location (Case No. 29-RC-5494): and on September 11 in a unit of all full-time and regular part-time office clerical employees of GBG employed at its Patchogue location (Case No. 29-RC-5495).[2]

On September 17 the Union filed timely objections to Respondent's conduct affecting all three elections. On the same day Respondent filed timely objections to the conduct of the Union affecting the results of the election in Case No. 29-RC-5495. On November 10 the Regional Director for Region 29 issued his Report on Challenged Ballots and Objections. The Regional Director ordered that a hearing be held on the challenges of two ballots, on the Union's Objection No. 2 and on Respondent's Objection No. 2, in part, and No. 3. The cases were consolidated for the purpose of hearing, ruling and decision by an Administrative Law Judge.

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[1] All dates refer to 1981 unless otherwise specified.

[2] In Case No. 29-RC-5493 the tally was one for, and two against, the Union; there was one challenged ballot, an insufficient number to affect the results. In Case No. 29-RC-5494 the tally was none for, and four against, the Union; there were no challenged ballots. In Case No. 29-RC-5495 the tally was five for, and five against, the Union; there were three challenged ballots, a sufficient number to affect the results.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. Briefs were filed by the General Counsel and Respondent.[3]

Upon the entire record of the case, including my observation of the witnesses, I make the following:

## Findings of Fact

### 1. The Business of Respondent

Respondent, a New York corporation, with its principal office and place of business in Patchogue, New York, is engaged in the sale and distribution of propane gas and related products. During the 12 months preceding the issuance of the complaint, Respondent purchased goods and materials valued in excess of $50,000 from suppliers located outside New York State. Respondent admits that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and I so find.

### 2. The Labor Organization Involved

The Union is a labor organization within the meanaing of Section 2 (5) of the Act.

### 3. The Issues

The issues in this proceeding are: (1) whether Synergy Group, Inc., GBG, NYP, and Vogel's Inc. constitute a single integrated business enterprise and a single employer within the meaning of the Act; (2) whether GBG issued disciplinary warnings, refused increases in pay, promised benefits and terminated several employees in violation of the Act; (3) whether a GBG supervisor interrogated employees concerning their Union activities; (4) whether GBG directed one of its employees to surveil Union meetings; (5) whether the Union solicited the support of supervisory personnel; (6) whether the Union intimidated employees

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[3] General Counsel's brief was limited to the issue of prosecutorial misconduct.

with threats of physical violence; (7) whether counsel for the board engaged in prosecutorial misconduct; and (8) whether GBG employees were unlawfully interrogated by counsel for Respondent.

### 4. Single Employer

Vogel's, Inc., a New York corporation, with its principal office and place of business at 175 Price Parkway, Farmingdale, New York, is engaged in the sales, servicing and leasing of forklifts and other material-handling equipment. NYP, a New York corporation, with its principal office and place of business also at 175 Price Parkway, Farmingdale, is engaged in the wholesale and retail fuel conversion of motor vehicles and sells propane gas to both wholesalers and residential customers. Synergy Group, Inc., a New York corporation, with its principal office and place of business also located at 175 Price Parkway, Farmingdale, is the parent corporation of GBG, NYP and Vogel's.

Daniel Shientag, General Counsel of the parent and its subsidiaries, testified concerning the officers and directors of the various corporations. With respect to Synergy Group, Inc., Sherman C. Vogel is president; Robert G. Hoffman is executive vice president; Jeffrey K. Vogel and Jonathan M. Vogel are vice presidents; and Steven A. vogel is vice president and secretary. The members of the Board of Directors are Sherman, Steven, Jeffrey, Jonathan and Jeanette Vogel. The officers of GBG are John P. Russell, president; Robert Hoffman, vice president; Jeffrey, Steven and Jonathan Vogel, vice presidents; Joel Garey, vice president; and Sherman Vogel, secretary.

The officers of NYP are John Russell, president; Jonathan, Jeffrey and Steven Vogel, vice presidents; Robert Hoffman, vice president; Sherman Vogel, secretary; and Joel Garey, assistant secretary. The Boards of Directors of both GBG and NYP consist of Sherman, Steven, Jonathan and Jeffrey Vogel. The officers of Vogel's, Inc. are Sherman Vogel, president; Steven, Jeffrey and Jonathan Vogel, vice presidents; Robert Hoffman, executive vice president; Jeanette Vogel, secretary; and Joel Carey, assistant secretary. Vogel's Board of Directors consists of Sherman, Steven,

Jonathan, Jeffrey and Jeanette Vogel. The outstanding stock of the parent is owned by the five Vogels.

Diane Geller administers the medical plan for the parent and all of its subsidiaries. Garey testified that Geller is also corporate administrator for GBG, NYP and Vogel's. She is involved in the hiring and firing of employees of the three subsidiaries. Garey also testified that he is involved in the management of the parent, GBG and NYP and that Russell is in charge of operations at all the locations. In addition, Joseph Brumell, corporate controller, was responsible for the financial records of the three subsidiaries and Neal Baselice, credit manager, handled corporate collections for GBG, NYP and Vogel's.

Ralph Kendrick, a GBG employee and shop steward for the drivers, credibly testified that "problems like people getting discharged, problems with money . . . people not being paid raises on time" were brought to Russell and Steven Vogel. In addition, contract negotiations were held with Sherman and Steven Vogel, Russell, Geller and Shientag. Kendrick further testified, which testimony was supported by documentary evidence, that as a GBG employee he made deliveries for, and did service and repairs on, NYP accounts. He further credibly testified that since September 1979 GBG's trucks were filled at NYP's premises and that occasionally GBG drivers use NYP trucks and vice-versa. Kendrick also credibly testified that GBG employees do "99 percent of the service work" for NYP customers and on occasion he has performed repairs for Vogel's. In addition, Wendy Gilner, another GBG employee, credibly testified that she released gas tickets for both GPG and NYP and that she received telephone calls from customers of both subsidiaries.

The Board has held that, in determining whether several corporations constitute a single employer, it is necessary to examine four criteria: interrelation of operations, common management, common ownership or financial control and centralized control of labor relations. *Soule Glass and Glazing Co.*, 246 NLRB 792, 794 (1979), enforcement granted in part and denied in part, on other grounds, 652 F.2d 1055 (1st Cir. 1981). Applying these

criteria, it is clear that Synergy Group, Inc., together with its above-named subsidiaries constitutes a single employer.

With respect to common ownership or financial control, each subsidiary is owned by Synergy, which in turn is owned by the five Vogels. As to common mangement, the officers and directors of the parent and each of the subsidiaries are substantially identical. Concerning centralized control of labor relations, grievances were brought to the attention of Russell and Steven Vogel. Contract negotiations were held with Sherman and Steven Vogel, Russell, Geller and Shientag. These individuals were involved in the management of the parent and each of the subsidiaries. Geller, the corporate administrator for the parent and the subsidiaries, was involved in the management of the parent and each of the subsidiaries, was involved in the hiring and firing of employees. With respect to the interrelation of operations, credit management was done centrally and health and medical programs were administered centrally. Employees of one subsidiary serviced accounts, made deliveries and made repairs for customers of another subsidiary. Since 1979 GBG trucks were filled at the premises of NYP.

Accordingly, based on the above, I find that Synergy Group, Inc., GBG, NYP and Vogel's Inc. constitute a single employer within the meaning of the Act.

### 5. Libynski

Lorraine Libyski has hired by GBG in February 1980. A month later she was transferred to work at Vogel's in Farmingdale. During the spring of that year organizing on behalf of Teamsters Local 707 began at Vogel's and Libynski was involved in that organizing. In July Libynski was transferred back to GBG and on August 1, 1980 she was discharged. In that connection a charge was filed and a complaint was issued alleging that the discharge violated Section 8(1) and (3) of the Act. That matter was settled on April 27, 1981.

In November 1980 Libynski received a phone call from Brumell, corporate controller, who offered her a position at GBG, which she accepted. Libynski testified that Brumell told her that

she would receive a raise in February 1981, the anniversary of when she was first employed. Libynski testified that in January 1981 she asked Gene Heyum, the GBG office manager, about the raise and he stated "he didn't know of any such a raise, but he would look into it." She further testified that she asked Garey about the raise but "he didn't want to discuss my raise at all, he didn't want to be bothered with it." She further testified that in February she spoke to Brumell about the raise and "he told me he would look into it and they kind of just all laughed at me."

On February 21 Libynski received two written warnings. One related to taking extra time for lunch after punching the timecard and the second warning related to unauthorized personal phone calls.

In May, Garey asked Libynski if she would be willing to accept the position of telephone operator, which position she accepted in June. Libynski credibly testified that when Garey offered her the position he told her that "he felt I had a good rapport with the customers, and that I handled myself well on the phone on Saturdays, that Steven Vogel liked when I did the operator's job." Soon after Libynski became the operator the telephone system was changed and for several weeks there was a good deal of confusion concerning the use of the new system. Libynski credibly testified that she was never reprimanded by management in regard to her performance as telephone operator.

During the last week of June a fellow employee, Mae Nannery, approached Libynski and "wanted to know a little background about a union, starting a union, because she knew that I had been involved with the union in Farmingdale." On July 6 Libynski signed an authorization card on behalf of Local 282, after which Libynski spoke to several other employees expressing her sentiments in favor of the Union.

On July 24, Libynski received the check in satisfaction of the settlement agreement entered into in April. Several days later, on July 27, Libynski was called into Heyum's office, at which time Heyum told her that she was fired. She asked him why, and he replied "it was for not using the telephone system to its

fullest potential and for incorrectly punching my timecard." When she asked him to explain his action, he replied, "that's all I can tell you."

A memorandum written by Garey, dated July 20, states that Libynski transfer to switchboard receptionist "has been a disaster." The memo mentions that Garey discussed with Libynski "her sloppy appearance and removing bobby pins from her hair during Company time." The memo continues, "I also spoke to her about punching in in the morning and then going out for coffee and cake on Company time." Finally, the memo states, "if this behavior continues, I'll have to terminate her." When asked specifically for the grounds of Libynski's discharge, Garey testified, "Lorriane Libynski was terminated because of failing to punch out . . . upon leaving the building, unacceptable behavior at the switchboard and her inability to perform properly.

Garey testified that there were continuing complaints going back to November 1980 concerning Libynski's unauthorized use of the phone, body odor and unkept appearance. He conceded, however, that just prior to her discharge her personal appearance had improved. Similarly, William Sheridan, assistant to Garey and GBG office manager testified that Libynski was a "terrible" employee from sometime "before" April 1981.

Elizabeth Purchia credibly testified that Ray Bianco, a GBG manager, spoke to her in August 1981 at which time he referred to Libynski as an "instigator"and "troublemake." Similarly, Wendy Gilner credibly testified that Garey told her "Lorriane Libynski was fired because of union action he knew that was taking place in the corporation."

**A. Failure to Grant Raise and Disciplinary Warnings**

With respect to the allegation that in February 1981 Respondent failed to grant Libynski a raise to which she had previously been promised, General Counsel has not sustained his burden of proving a violation. In the first place, I do not believe that

General Counsel has sustained his burden of showing that Libynski had been promised a raise. Nevertheless, even if such a promise had been made it has not been shown that the failure to give the raise in February was due to union activities. Libynski's union activities with respect to Local 282 began in June 1981. While Libynski had been involved in organizing activity for Local 707 in the summer of 1980, no connection has been made between that activity and the alleged failure to grant a raise in February 1981. Accordingly, such allegation is dismissed. Similarly, the complaint alleges that the two disciplinary warnings given in February were because of Libynski's union activities. Again, no such showing has been made. Accordingly, the allegation is dismissed.

### B. Discharge

With respect to the allegation that Libynski was discharged in July 1981 because of her Union activities, I find that General Counsel has sustained his burden of proof. Libynski signed an authorization card on July 6 and thereafter spoke to several employees in favor of the Union. While Respondent has advanced several defenses for the discharge, I find these reasons to be pretextual. Thus, Garey complained about Libynski's personal appearance, yet he conceded that her appearance improved after she became telephone operator. Similarly, Garey testified that the complaints concerning Libynski's appearance and performance went back as far as November 1980, yet she was not discharged until July 1981, soon after the beginning of her activities on behalf of Local 282. In the same vein Sheridan testified that Libynski was a "terrible" employee as far back as early 1981, yet she was not discharged until July. Finally, Purchia credibly testified that a member of management referred to Libynski as an "instigator" and "troublemaker" and Gilner credibly testified that Garey told her that Libynski was fired because of her Union Activities. Accordingly, I find that Libynski was discharged for her Union activities on behalf of Local 282, in violation of the Act.

### 6. Nannery

#### A. Denial of Wage Increase

Mae Nannery began her employment with Respondent on August 3, 1979. She testified that in May 1981 she asked Garey for a raise, to which he replied "let me see what I can do for you." During the last week of June, Garey requested that Nannery work on July 4. She explained to him that she had a family gathering planned and, accordingly, she refused to work. He told her that if she didn't work there would be "no pay raises." She further testified:

> And then after the 4th of July weekend, he came in like around the 15th or 16th he came in and he said, I had the raises right on Sherman's desk and it was all approved and everything, but I'm calling him right now and telling him to tear it all up, you can't work July 4th and do a favor for me, he says, don't you ever ask me for another thing.

Garey corroborated Nannery's testimony. He testified that in June he recommended a raise for Nannery. He further testified that GBG was planning a sale on July 4 and he required that Nannery work that day. After she failed to report for work on July 4 he testified that "I sat down right at my desk and I wrote this memorandum to recall the wage increase I had recommended her for." Dolores Burke, Nannery's supervisor, credibly testified that Garey "was angry because she didn't work July 4, she didn't cooperate, and he said, if she doesn't cooperate with me, I'm not cooperating with her, she's just not getting any raise."

I find that General Counsel has not sustained his burden of showing that the denial of Nannery's raise in July 1981 was due to her Union activity. I find that Garey decided to retract the raise when Nannery did not report for work on July 4 and that the reason the raise was retracted was because she did not report for work. Accordingly, the allegation of the complaint is dismissed.

### B. Discharge

After the July 4 episode, Nannery decided to talk to Kendrick to obtain Union authorization cards. She obtained the cards and began distributing them around July 6. Trypaulik, Rhodus and Purchia each testified that they received authorization cards from Nannery on July 6.

On July 16 Garey called Nannery into his office and said "what's going on, you girls up to something. Everytime I come in you're whispering something." At around the same time, Burke asked Nannery "well are you girls going union or not?"

During the latter part of July Nannery inquired of Burke as to the number of floating holidays she was entitled to. Burke told Nannery to call Pat, who was the head of the payroll department in Farmingdale. Nannery called Pat and was told that she was entitled to four floating holidays. Nannery had been under the impression she was entitled to six floating holidays and was somewhat upset over the conversation. Some of the employees overhear Nannery's conversation with Pat.

On July 27 Nannery went to a local 7-Eleven food store to pick up provisions for lunch without punching out. She credibly testified that Burke, her supervisor, had approved this. This testimony was corroborated by Burke. On July 28 Garey advised Nannery that she was being terminated because she failed to punch out the day before and because she called the Farmingdale office to inquire concerning her floating holidays.

Burke, who appeared to me to be a particularly credible witness, testified that she realized, around the end of June and the beginning of July, that Nannery and some of the employees were going to organize. She credibly testified that she had a conversation with Sheridan, the office manager, at which time she told him "I think the girls are unionizing, in fact, I'm almost sure they are." Sheridan suggested to Burke that she call Garey to give him the information. Burke credibly testified that during the first week of July she called Garey at home and told him

"I think the girls are unionizing." Garey asked Burke which girls were unionizing, to which she replied, Nannery, Libynski and Trypaulik. Burke further credibly testified that during the second week of July she told Garey, "the girls are really giving me a hard time, I don't know what's going on. He said to me, don't worry about it, they're getting terminated anyway."

On July 28 Garey wrote a memorandum, in which he stated:

> Therefore I told Mae I was terminating her because of her poor attitude, failure to stop leaving the premises without punching out despite several warnings, and spreading false rumors to disturb the other employees.

When asked what were the events that led to Nannery's discharge, Garey testified, as follows:

> Badmouthing the company, . . . . getting into temper tantrums, failing to punch out when leaving the company premises or not having the approval of a supervisor, spreading lies and rumors to other employees in her attempt /to/ incite and aggravate them.

Sheridan testified that from the end of 1980 Nannery had been "generally uncooperative, not willing to extend herself in any way, at times a troublesome employee." He further testified that Nannery was "always a terrible employee."

As noted earlier, Purchia credibly testified that Bianco referred to both Nannery and Libynski as "instigators." Also, Gilner credibly testified that Garey told her "Mae Nannery had been discharged because of her union action in the company."

I find that General Counsel has sustained his burden and that Nannery was discharged because of her Union activities. The reasons given by Respondent for her discharge were clearly pretextual. With respect to her obtaining provisions at the 7-Eleven without punching out, both Nannery and her supervisor, Burke,

testified that Burke gave Nannery permission to do so. As to spreading false rumors concerning the floating holidays, Burke told Nannery to call Pat in Farmingdale to find out how many floating holidays she was entitled to. Pat told Nannery that she was entitled to four days. In this connection Trypaulik credibly testified:

> And I overhead the conversation that she was having with the main office about holidays. We were under the impression that we had six holidays and she was being told that we had only four. So when she finished the conversation on the phone, I had asked her, because I had overhead her, how many holidays it was, whether it was four or six, and she had told me that they were saying four.

Trypaulik testified that Nannery spoke in a "normal voice" when she spoke about the floating holidays.

Nannery was the prime organizer among the clerical employees. During the second week of July Garey told Burke, concerning Nannery and others, "don't worry they're getting terminated." This is in line with Garey's statement to Gilner after the termination that Nannery was terminated because of her Union activities. It is clear, therefore and I so find, that Nannery was discharged because of her Union activities, in violation of the Act.

### 7. Burke

#### A. Supervisory Status

Dolores Burke started working for Bottled Gas Service in January 1978 and was transferred to GBG in June 1979. In February 1980 she became GBG's office manager. Counsel for Respondent stiputlated that Burke was supervisor, within the meaning of the Act, in her position as office manager.

Burke credibly testified that in February 1981 Garey approached her and told her that a new sales department was opening and offered her the position of sales manager. Burke accepted the position as sales manager, supervising two employees, Nannery and Purchia. Burke credibly testified that she retained the same authority in her position as she had had as office manager. She remained on a straight salary, did not punch a timeclock and took one hour for lunch. In addition, when emplyees requested time off, such requests were brought to Burke. Burke recommended the rehiring of Purchia and assigned work to the employees under her supervision.

Nannery corroborated Burke's testimony. She testified that in March, Garey told her that Burke was her immediate supervisor. Burke assigned her work and approved days off. Gilner also credibly testified that Burke assigned work to Nannery and Purchia. Similarly, Trypaulik credibly testified that Burke assigned work and Purchia credibly testified that she was recommended by Burke to be rehired; that Burke was her supervisor and assigned work; and that she asked Burke for time off. In addition, the record contains memoranda showing that on August 1 and August 25 Denise Dempsey requested days off from Burke. Finally, the *Excelsior* list provided by Respondent did not include Burke's name, another indication that she was considered a supervisor.

Accordingly, it is clear from the above and I so find, that during the summer of 1981 Burke was a supervisor, within the meaning of the Act.

### B. Interrogation by Burke

Nannery credibly testified that on or about July 16 Burke asked her "are you girls going union or not?" Similarly, Purchia credibly testified that during July, Burke "came in and sat down

testified that during July, Burke "came in and sat down next to me and said, 'are you joining the union?' " This testimony was not controverted. Indeed, Burke corroborated the testimony and testified that she told Nannery:

> You're really going to do it, right, you're really going to unionize. She said, what are you talking about. I said, I can see it, you're really going to do something. She said, not I'm not, I don't know what you're talking about. I said you're going to unionize.

It is clear, and I so find, that Burke asked Nannery and Purchia whether they were going to unionize. Inasmuch as Burke was a supervisor, within the meaning of the Act, this constitutes unlawful interrogation.

### C. Demotion of Burke

Paragraph 21 of the Amended Complaint alleges that in September 1981 Respondent changed the position of Burke from a supervisory position to that of a regular employee, in violation of the Act.

Burke credibly testified that on September 17:

> Joel Garey called me into the office, Gene Heyum's office, and he told me that Diane Geller just received a letter from the Labor Board stating that May Nannery was pressing charges because I was fully aware of the unionizing and because I was management she was pressing charges, that they knew about her unionizing before she got fired. Joel Garey then told me I want you to tell the Labor Board that you thought they were kidding and that you are not management.

Burke testified that after September the employees did not bring her time off requests and did not bring her work-related problems. However, she also testified that no one ever told her that she no longer had the authority over the employees. Burke testified that she remained on salary, did not begin punching

a timeclock and retained a longer lunch period than nonsupervisory employees.

Based on the above, I believe that General Counsel has not sustained his burden of showing that in September Burke's position changed from a supervisory position to that of a regular employee. Respondent's regular employees punched timeclocks, were paid on an hourly basis and were entitled to only 30 minutes for lunch. Burke's benefits in this regard were not diminished. Accordingly, the allegation is dismissed.

### 8. Trypaulik

#### A. Supervisory Status

Mary Trypaulik began her employment with GBG on August 1, 1979. She worked in the collection department, handling the larger commercial accounts. On May 15, 1981 Joe Avalone, manager of the collection department, resigned and was not replaced.[4] Inasmuch as Trypaulik was the senior employee in the department, other employees began coming to her with their problems.

Trypaulik testified that during July 1981:

> Joel Gary had come to me and asked and said he wanted me to continue doing the same job I was doing, but he also wanted me to be the head of the collection department. But I told him that I already do that already, and he said, no, that he wanted me to be the head, to be the supervisor there. And I told him that I really did not want it, the position. I didn't like titles. I don't like titles. I didn't feel it was necessary and I didn't feel I was a supervisor. I told him that I wouldn't refuse to help the girls as I've always done, but I just — I didn't want that position.

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[4] Resignation letter of Joseph Avalone dated May 15, 1981, submitted as a post-hearing exhibit, is admitted into evidence as G.C. Exhibit No. 51.

After that conversation, Garey called the two other employees in the collection department, Mary Rhodus and Nadia Noto, into his office. Trypaulik testified:

> Joel told the girls from then on that they were to go to me for any questions or problems, and then he said I was their supervisor. And I told him, I said "wait a minute; I told you, I have no title and I'm not a supervisor."

Trypaulik testified that nothing changed with regard to her work duties after the conversation with Garey. She testified that she did not hire, fire or discipline employees, did not approve time off and did not assign work.

Trypaulik further testified that in the beginning of September, before the election, she was invited by Garey to attend a meeting. She testified:

> When I walked in, I noticed it was all management and I told them this was a management meeting and I really didn't want to stay, because I am not management. And he said "we feel you are." And Bill was there and I looked across and I said to Bill, I said, "I don't know why you keep pushing that I'm management. You were there at the meeting when I told Joe that I had no title and I was not management and I refused it." At that point, Joel told me I was excused from the meeting. So I left the room.

Trypaulik testified that she was not asked to attend any other management meetings. She further testified that she punches a timeclock and that she is alotted a half-hour for lunch.

Burke corroborated Trypaulik's version of what took place at the management meeting. Burke testified that Trypaulik attended two management meetings. At the first one "she said she didn't really want to be there because she wasn't a manager," and at the second one she said, "I prefer not to be here, I'm not a manager, and you know I'm not a manager, and Joel Garey

excused her." Rhodus testified that Trypaulik played no supervisory role with respect to her. She testified that even after July Trypaulik did not assign her work and that she did not bring time-off requests to Trypaulik.

Nadia Noto credibly testified that in July Garey called herself, Rhodus and Trypaulik into the office. She testified that Garey told them that he offered the position of credit manager to Trypaulik but that she refused the position. Noto further testified that she did not bring time-off requests to Trypaulik, that Trypaulik did not assign work and did not exercise any authority over her.

The record contains a memorandum from Garey to Geller dated May 26, 1981 stating "please be advised that I have appointed Mary Trypaulik to the position of Credit Manager." Garey further testified that in May he told Trypaulik that "she would be responsible for the credit and collection activities at Glover Bottled Gas." He did not tell her that she had the right to hire, fire or discipline employees, that she could assign work or that she could exercise any of the other normal indicia of supervisory status. He testified that he considered this merely as offering her the job, and that a week later she told him that she accepted the new position. Garey testified that at that point he "called the other girls in and advised the girls in the credit department that Mary was going to be supervisor." When asked whether at that meeting he told the employees what Trypaulik's duties were going to be, he replied, "I don't believe I did, no." Garey conceded that Trypaulik was the only supervisor not on a straight salary, that she continued to punch the timeclock and that she received only 30 minutes for lunch.

I credit the testimony of Trypaulik, Burke, Rhodus and Noto. Based on their testimony, I find that around the middle of July Garey asked Trypaulik to become head of the collection department. She told Garey that she did not want to have a supervisory position but that she would be willing to continue in her capacity as senior collection clerk and would be willing to answer any questions that the other employees may have. Garey called the other employees to a meeting and told them that he offered

Trypaulik the position of credit manager but that she refused it. I find that Tryapulik did not assign work, did not hire, fire or discipline employees, did not grant days off and did not exercise any of the other indicia of supervisory status. Accordingly, I find that prior to the election, Trypaulik was not a supervisor, within the meaning of the Act.

**B. Offer of Promotion and Wage Increase.**

The complaint alleges that the above-described offer of promotion and a 50¢ raise granted to Trypaulik on August 28 constitute violations of Section 8(a)(1) of the Act.

In assessing whether the granting or offering of benefits constitutes a violation of Section 8(a) (1) it must be determined whether such grant or offer is "calculated to interfere with the employees' right to organize." *Centralia Fireside Health, Inc., d/b/a The Fireside House of Centralia*, 233 NLRB 139, 140 (1977). With respect to Garey's offer to promote Trypaulik, Trypaulik was acting as senior collection clerk since Avalone resigned in May. She helped the other employees with their problems and it would seem natural that she would be asked to assume the title of supervisor. I do not believe that General Counsel has shown by a preponderance of the evidence that Respondent's action had an unlawful purpose.

Concerning Trypaulik's raise on August 28, the record indicates that Trypaulik's prior two raises were 25¢ to 40¢ per hour. The 55¢ per hour raise in August was not disproportionate to the raises previously given by Respondent. See *Micro Measurements*, 233 NLRB 76 (1977). Here too, I do not believe that General Counsel has shown by a preponderance of the evidence that Respondent's action had an unlawful purpose.

Accordingly, the allegations that Respondent unlawfully offered Trypaulik a promotion and granted her a raise are dismissed.

**9. Gilner**

The complaint, as amended, alleges that on or about July 19 Respondent denied Wendy Gilner a raise which had previously been promised. The complaint further alleges that Garey directed Gilner

to surveil Local 282 meetings and that Gilner, as agent of Respondent, engaged in such surveillance.

Gilner testified that in July she became supervisor of customer service and that she was told by Garey that there would be a four-week trial period at the end of which she would either receive a raise or would return to her position as customer service clerk. She testified that she did not receive the raise because there was "union action taking place in the company." The record contains a great deal of testimony concerning Gilner's supervisory status. However, towards the close of the hearing, counsel for the General Counsel stipulated that for the purposes of this proceeding Gilner is not to be considered a supervisor. Since the question of whether Gilner was promised a raise is contingent upon the question of whether she was offered the position of supervisor, General Counsel's stipulation that Gilner was not a supervisor in effect eliminates paragraph 19 of the complaint, as amended. Accordingly, I make no finding with respect to such allegation.

Gilner testified that at the end of July Garey told her "if when I was attending a union meeting, if there was ever anything that I wanted to tell him, he would be willing to listen." She testified that she never told Garey what happened at the Union meetings and that he never asked her. Garey denied that such a conversation took place. Inasmuch as the record contains no evidence to corroborate Gilner's testimony as to the conversation, I find that General Counsel has not shown by a preponderance of the evidence that such a conversation took place. Accordingly, the allegation is dismissed.

### 10. Union Threats

Objection No. 2 filed by Respondent alleges that during the immediate pre-election period the Union and its representatives intimidated employees with threats of physical violence. In this regard the Regional Director directed that a hearing be held with regard to the alleged threat made by Andrew Boggia, Business Agent for Local 282.

Ralph Kendrick testified that at the second Union meeting held in early September there was some discussion about what might happen if there was a strike. He credibly testified:

> Andy /Boggia/ discussed what used to go on in the old days of organizing and explained more or less how there used to be a lot of hard times on the strike lines with violence and stuff like that. But he also reiterated that that no longer is the case, that today things aren't done like that and that, you know, there is really nothing they could do if somebody wanted to cross the picket line. I in turn told everybody there that in no way does Local 282 advocate violence on a picket line at any time.

Nannery corroborated Kendrick's testimony. She testified that Boggia "was explaining that a long time ago, it used to be a dangerous thing, but he says it's no longer, he says we try to settle everything out in a reasonable manner." Gilner, Libynski, Trypaulik, Rhodus and Purchia all testified that neither Boggia nor anyone else from Local 282 made any threats. While Lodato testified that Boggia said, "Well, that is up to you girls to take care of. I cannot be arrested for hitting women," Lodato denied that Boggia threatened any employee at the meeting. Similarly, Dempsey testified that Boggia said "if there was a strike they would go to any lengths to protect their jobs and anyone crossing their picket lines could get hurt." When asked whether this was the exact language that Boggia used, Dempsey replied that it was the "influence I got from it. I don't know if it was the exact language. I do not recall."

I credit the testimony of Kendrick, Nannery, Trypaulik, Gilner, Libynski, Rhodus and Purchia and find that Boggia did not make the alleged threat. Accordingly, Respondent's Objection No. 2 is overruled.

### 11. Prosecutorial Misconduct

Alva Avila, a NYP driver, was originally called as a witness on behalf of General Counsel. He was subsequently recalled on behalf of Respondent, at which time he testified that he received several calls from James Castagna, Counsel for the General Counsel.[9] Avila testified that the first call he received was around

[9] Tape of phone conversations between Castagna and Mr. and Mrs. Avila, submitted as a post-hearing exhibit, is admitted into evidence as G.C. Exhibit No. 52.

10:30 p.m. on a Sunday before the election. Avila testified that the initial conversation took approximately 30 seconds and that Castagna:

> told me he was from the National Labor Relations Board, and he had me confused with somebody from Farmingdale, a mechanic in the garage, so I told him, I says, I don't know who you are, I says, and if you're a government employee working on a Sunday night, I says, you're crazy, and I hang up.

Avila testified that he then called his supervisor and ascertained that there was a person named Castagna who worked for the National Labor Relations Board. Avila testified that he received another call about an hour later in which the caller identified himself as Mr. Castagna from the NLRB. During this conversation Castagna asked Avila questions about his job and about other employees and Avila answered the questions. Avila testified that subsequent to these two conversations he received messages from his wife that Castagna was calling the house trying to get in touch with him. He returned the calls by calling the National Labor Relations Board leaving messages for Mr. Castagna. Sometime after having left the messages, Avila testified that he had a third conversation with Castagna at which time the caller identified himself as "Jim Castagna from the Labor Board." During this conversation Avila told Castagna that he had been receiving threatening phone calls.

Avila testified that he received a fourth call, but he did not know the date of the call or how long it was after the third call. He testified, as follows:

> Q. Now, during this conversation, someone calls up and says, this is Jim Castagna from Local 282, correct?
>
> A. Correct.
>
> Q. But you knew that Mr. Castagna wasn't from 282, correct?

A. Up to that point, no, I didn't know.

Q. You didn't know?

A. No.

Concerning this conversation, Avila further testified:

Q. So this person says, I'm Jim Castagna from 282 and what? What did he say?

A. He says something to the effect, and he was laughing when he said it, that he was going to break my legs.

Q. He was laughing?

A. Yes.

Q. He said, hi, I'm Jim Castagna from 282, I'm going to break your legs, correct?

A. Correct.

Q. And what was said after that?

A. I believe he says, no, I'm kidding. I says, I called you to ask more questions about the case.

Q. So he told you he was kidding?

A. Yes.

Q. And then what questions did he ask you about the case?

A. I don't remember.

Q. So you believed he was joking around with you when he called?

A. Yes, I would say that, yes.

Castagna testified that he called Avila at approximately 9 p.m. on October 4. He identified himself as an attorney with the National Labor Relations Board but mistakenly gave the wrong name of the company by whom Avila was employed. When Castagna asked Avila whether he worked for that other company, Avila replied "no and hung up the phone." About an hour later Castagna called again, and again identified himself as being with the National Labor Relations Board. Castagna asked Avila certain questions about New York Propane and its employees and Avila answered the questions.

Castagna testified that between October 4 and October 22 he tried to contact Avila but was unsuccessful and left messages for Avila to call him at his office. At approximately 10 p.m. on October 22 Castagna placed another call to Avila. Castagna testified that he again identified himself as James Castagna from the National Labor Relations Board. Castagna testified, as follows:

> At that point /Avila/ said he had been getting threatening phone calls from the Union. So, I asked him what kind of phone calls was he getting. He said to me that somebody was calling him up and threatening him. I asked him how were they threatening you, and he said they were telling me that I might not make it home alive the next day. They were going to break my legs, and I said did they identify themselves in any way, and he said no.

Castagna denied that he ever identified himself as being from Local 282 or from the Union. He denied that he ever identified himself as being from any place other than from the National Labor Relations Board and he denied that he ever threatened to break Avila's legs or threatened Avila in any other way.

I credit Castegna's testimony. He appeared to me to have a good recollection of the events. Avila, on the other hand, did not appear credible. He testified that in the first three conversations Castagna identified himself as being from the National Labor Relations Board. He further testified that between the

second and third conversations he returned messages by calling the NLRB. Yet, when questioned concerning the fourth conversation as to whether he knew that Castagna wasn't from Local 282, Avila answered, "up to that point, no, I didn't know." I find this to be a total contradiction of his prior testimony.

Inasmuch as I have credited the testimony of Castagna, I find that Castagna did not misidentify himself and did not state to Avila that "I'm going to break your legs." Accordingly, Respondent has not sustained its burden of proving that Castegna engaged in prosecutorial misconduct and the allegation is therefore dismissed.

12. Interrogation by Counsel for Respondent

Paragraph 22 of the complaint, as amended, alleges that during June 1982 Counsel for Respondent, Daniel Shientag and Diane Geller, interrogated employees concerning the testimony they were going to give in this proceeding.

Dolores Burke testified that she had a telephone conversation with Dianne Geller on June 3, 1982, at which time Geller asked Burke to come to her office in Farmingdale the following morning. Burke credibly testified that she asked Geller whether she would be asked any questions and Geller replied, "no, we're not asking you any questions." Burke further credibly testified that on June 3 she was not told that her appearance the following day was voluntary. Burke testified that when she appeared for the meeting on June 4 she was "very upset" because she had already heard that Gilner was fired that morning. Burke testified that Shientag and Geller asked her about the statement she made to Nannery, about the conversation she had with Purchia and about her authority in the sales department. Burke further testified that she was not told that there would be no retaliation against her if she did not answer the questions. On the contrary, she testified, "I felt that what they did to Wendy Gilner they would do the same thing to me, if I said anything, so I said as little as I could."

Mary Trypaulik also testified that on June 3 she received a telephone call from Geller asking her to come to Farmingdale for a meeting the following morning. During that conversation

Trypaulik was not told that her appearance was voluntary. When she appeared the following morning Shientag asked her if she "ever attended a dinner for the union." He also questioned her about what was said at the Union meeting. While Trypaulik initially testified that she was not told that her appearance was voluntary and that she was not told that there would be no retaliation if she did not answer the questions, on cross-examination she was asked whether she was told that a person has the right not to talk to a lawyer. She replied, "Yes, I think you did." Similarly, on cross-examination, when asked whether she was told that "no harm would come" to her "as a result of talking" to Shientag, she replied, "I think you said that when I was leaving, yes."

Mary Rhodus similarly testified that she was called by Geller in June 1982 and asked to attend a meeting in Farmingdale. At the time of the call she was not told that her appearance was voluntary. When she met with counsel for Respondent Shientag asked her questions about the Union meeting. She testified that Shientag told her that she was under no compunction to speak with him. With respect to whether he told her that there would be no reprisals, she answered, "you may have, I really don't remember."

Geraldine Lodato testified that she was called by Geller to attend a meeting in Farmingdale. She testified that at the meeting with Shientag and Geller she discussed the Union meeting that she attended. She further testified that she was not advised by either Shientag or Geller that there would be no retaliation against her with respect to the conversation. She also testified that she was not advised that her appearance at the meeting was voluntary.

Although the Board permits interrogation under certain circumstances, specific safeguards have been established to minimize the coercive impact of such employer interrogation. These safeguards were spelled out in *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), enforcement denied on other grounds, 334 F.2d 617 (8th Cir. 1965):

> /T/he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilage.

Lodato unequivocally testified that a the meeting with Shientag and Geller she was not told that her appearance was voluntary nor was she told that there would be no retaliation. Trypaulik testified that she was first told that there would be no retaliation when she was leaving, after the interrogation had taken place. Neither Shientag nor Geller was called as a witness to refute this testimony. Accordingly, I find that Respondent did not observe the *Johnnie's Poultrie* safeguards with respect to Lodato and Trypaulik. [6]

### 13. Other Allegations

Paragraph 25 of the complaint, as amended, alleges that Respondent engaged in certain action against Libynski and Barzilay because they testified in Case Nos. 29-CA-8184 and 29-RC-5495. I find that General Counsel has not sustained his burden of proof with respect to this allegation. Accordingly, the

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[6] Inasmuch as Respondent violated Section 8(a)(1) through counsel's interrogation of Lodato and Trypaulik, it is not necessary that I decide whether the interrogation of Burke, a supervisor, constitutes a violation. Cf. *Parker-Robb Chevrolet, Inc.*, 262 NLRB No. 58 (1982). With respect to Rhodus, her testimony was ambiguous as to whether she was advised that her appearance was voluntary and that there would be no retaliation.

allegation is dismissed. In addition, with respect to any allegations not specifically discussed in this Decision, I find that General Counsel has not sustained his burden of proof, and the allegations are, accordingly, dismissed.

### 14. Conclusions as to Objections

Union Objection No. 2 relates to the alleged unfair labor practices in Case No. 29-CA-9116. Inasmuch as I have found that Respondent committed various unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, as described in this Decision, I sustain Union Objection No. 2. As discussed above, I have found that the Union did not intimidate employees with threats of physical violence and that it has not been shown that the Union solicited and obtained the support of supervisory personnel. Accordingly, Respondent's Objections Nos. 2 and 3 are overruled.

While the unfair labor practices involved GBG, I have found that Synergy Group, Inc., NYP, Vogel's, Inc. and GBG constitute a single employer within the meaning of the Act. As described above, I have found that there was a certain degree of employee interchange between the subsidiaries. In addition, the unfair labor practices committed at GBG were communicated to employees of NYP. Thus, Kendrick credibly testified that he told Avila, an employee of NYP, that Libynski and Nannery were discharged for what he thought was their Union activity. Avila corroborated this testimony and testified that Kendrick told him "two employees, two girls that worked at Glover," were fired because they were "participating in the Union." Similarly, William Kampe, a GBG driver, testified that NYP employees discussed with him the discharges of Libynski and Nannery. It is likely, therefore, that the unfair labor practices committed at GBG would have impacted on the employees of NYP. Accordingly, I recommend that the elections held in Case Nos. 29-RC-5493 and 29-RC-5494 be set aside and that new elections be held. See *Petroleum Electronics, Inc.*, 250 NLRB 265, 273 (1983), enfd. 107 LRRM 2552 (3d Cir. 1981).

In the GBG election (Case No. 29-RC-5495) there were 3 challenged ballots, those of Libynski, Nannery and Trypaulik.

Having found that Libynski and Nannery were discharged in violation of Section 8(a)(3) and that they actively supported the Union, I believe that it is likely that the opening and counting of these challenged ballots will produce a conclusive result. Accordingly, I recommend that Case No. 29-RC-5495 be severed and remanded to the Regional Director for Region 29 for the purpose of opening and counting the challenged ballots. If the revised tally of ballots shows that the Union received a majority of the votes case, the Regional Director shall issue a certification of representative. In the event that the revised tally of ballots shows the Union has not received a majority of the votes case, the Regional Director shall set aside the election in Case No. 29-RC-5495 and shall direct a new election.

## Conclusions of Law

1. Glover Bottled Gas Corp., Synergy Group, Inc., New York Propane Corp., and Vogel's Inc., constitute a single integrated business enterprise and a single employer, engaged in commerce, within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees about their Union activities and by questioning employees without providing the necessary safeguards, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminatorily discharging employees Lorraine Libynski and Mae Nunnery because of their activities and support of the Union, Respondent has committed unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. Respondent did not violate the Act in any other manner alleged in the complaint.

## The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease

and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discharged Lorraine Libynski and Mae Nannery in violation of the Act, I find it necessary to order Respondent to offer them full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any losses of earnings that they may have suffered from the time of their termination to the date of Respondent's offers of reinstatement. Backpay shall be computed in accordance with the formula approved in *F.W. Woolworth, Co.*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). [7]

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[8]

## ORDER

Respondents, Glover Bottled Gas Corp., Synergy Group, Inc., New York Propane Corp., and Vogel's Inc., their officers, agents, sucessors and assigns shall:

1. Cease and desist from:

(a) Interrogating their employees in a manner interfering with their rights under Section 7 of the Act.

(b) Discharging or otherwise discriminating against employees in regard to terms or conditions of employment because of their Union activities.

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[7] See generally *Isis Pluming & Heating Co.*, 138 NLRB 716, 717-721 (1962).

[8] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all orjections thereto shall be deemed waived for all purposes.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Lorraine Libynski and Mae Nannery immediate and full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any losses of earnings, in the manner set forth above in the section entitled "The Remedy."

(b) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Expunge from their files any references to the discharges of Lorraine Libynski and Mae Nannery on or about July 27 and 28, 1981 and notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

(d) Post at their facilities copies of the attached notice marked "Appendix." [9] Copies of the notice on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representatives shall be posted by Respondents immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that the notices are not altered, defaced, or covered by any other material.

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[9] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 29, in writing, within 20 days of the date of this Order, what steps the Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that those allegations of the complaint as to which no violations have been found are hereby dismissed.

IT IS RECOMMENDED that the elections held on September 10 and 11, 1981 in Case Nos. 29-RC-5493 and 29-RC-5494 be set aside and that the cases be remanded to the Regional Director for Region 29 for proceedings consistent herewith.

IT IS FURTHER RECOMMENDED that Case No. 29-RC-5495 be severed and remanded to the Regional Director for Region 29 for the opening and counting of the challenged ballots. If the revised tally of ballots indicates that the Union was designated by a majority, the Regional Director shall issue a Certification of Representative. If the revised tally of ballots shows that the Union has not been designated by the majority, the Regional Director shall direct a new election.

Dated, Washington, D.C. August 5, 1983.

/s/ D. Barry Morris

D. BARRY MORRIS
Administrative Law Judge

## Appendix F - Report of Challenged Ballots and Objections, Order Consolidating Cases and Notice of Hearing, Dated November 10, 1981

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NEW YORK PROPANE CORP.

and

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

GLOVER BOTTLED GAS CORP.

and

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

---

Case Nos. 29-RC-5493
29-RC-5494

Case No. 29-RC-5495
29-CA-9116
29-CA-9117

**REPORT OF CHALLENGED BALLOTS AND OBJECTIONS, ORDER CONSOLDIATING CASES AND NOTICE OF HEARING**

Upon a petition filed on July 23, 1981 in Case No. 29-RC-5493, and pursuant to a Stipulation For Certification Upon Consent Election, executed by and between New York Propane Corp., a subsidiary of Synergy Group, Inc., and Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Petitioner, and approved by the undersigned Regional Director on August 12, 1981, an election by secret ballot was conducted on September 10, 1981, in a unit of all full-time and regular part-time truckdrivers and yardmen

employed at its Medford location, and excluding all office clerical employees, guards and supervisors as defined in the Act.

The Tally of Ballots served upon the parties at the conclusion of the election showed the following results:

Approximate number of eligible voters..... 4

Void ballots..... 0

Votes cast for Petitioner..... 1

Votes cast against participating labor organization 2

Valid votes counted..... 3

Challenged ballots..... 1

Valid votes counted plus challenged ballots..... 4

Challenges are not sufficient in number to affect the results of the election.

PLEASE TAKE NOTICE that on the 7th day of June, 1982 at 10:00 a.m., in a hearing room on the fourth floor, 16 Court Street, Brooklyn, New York, a hearing will be conducted before an administrative law judge of the National Labor Relations Board on the issues set forth in the above Order, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony on all issues raised by the Consolidated Complaint in CAse No. 29-CA-9116 and 29-CA-9117 and the challenges to the ballots and objections in Case Nos. 29-RC-5493, 29-RC-5494 and 29-RC-5495.

## RIGHT TO FILE EXCEPTIONS

Under the provisions of Section 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the National Labor Relations Board addressed to the Executive Secretary

at 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. Exceptions must be received by the Board in Washington, D.C. before November 23, 1981.[28]

Dated at Brooklyn, New York, this 10, day of November 1981.

s/Samuel M. Kaynard

Samuel M. Kaynard
Regional Director
National Labor Relations Board
Region 29
16 Court Street
Brooklyn, New York 11241

[28] Pursuant to Section 102.69(g), affidavits and other documents which a party has timely submitted to the Regional Director in support of objections and challenges are not part of this record unless included in the Regional Director's Report or appended to the Exceptions or opposition thereto which a party submits to the Board.

## Appendix G - Answer to Complaint

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

---

GLOVER BOTTLED GAS CORPORATION

and

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

---

Case Nos. 29-CA9116
29-CA9117

Glover Bottled Gas Corporation, for its answer to the complaint herein:

**First:** Respondent lacks information sufficient to form a belief about the allegations contained in paragraphs 1(a) and 1(b).

**Second:** Respondent admits paragraphs 2, 3, 4 and 5.

**Third:** Respondent lacks information sufficient to form a belief about the allegations in paragraph 6(a) and 6(b).

**Fourth:** Respondent denies paragrpah 7 except to admit that Joel Garey is the Vice President of Respondent and is a Supervisor within the meaning of the National Labor Relations Act.

**Fifth:** Respondent admits paragraphs 8(a) and 8(b).

**Sixth:** Respondent denies each and every allegation in paragraphs 8(c), 8(d) and 8(e) except admits that Synergy Group, Inc. has its principal office at 175 Price Parkway, Farmingdale, New York.

**Seventh:** Respondent admits paragraph 9(a) except to the extent that Respondent lacks information sufficient to form a belief as to whether Local 707 engaged in an organizational campaign among the employees of Vogel's, Inc. during May of 1980.

**Eighth:** Respondent lacks information sufficient to form a belief about the all egations in paragraph 9(b).

**Ninth:** Respondent admits paragraph 9(c).

**Tenth:** Respondent denies each and every allegation in paragraph 10.

**Eleventh:** Respondent admits paragraph 11 with the exception that respondent denies the allegation that Respondent previously promised Lorraine Libynski an increase in her rate of pay.

**Twelfth:** Respondent denies each and every allegation in paragraphs 12, 13 and 14.

**Thirteenth:** Respondent admits paragraph 15 to the extent that on July 14, 1981 Mae Nannery was told of the decision not to increase her rate of pay.

**Fourteenth:** Respondent denies paragraph 16, except to admit that Lorraine Libynski was discharged on July 27, 1981.

**Fifteenth:** Respondent admits paragraph 17.

**Sixteenth:** Respondent denies paragraph 18, except to admit that Respondent has failed to offer to reinstate employees described in paragraphs 16 and 17.

**Seventeenth:** Respondent denies each and every allegation in paragraphs 19, 20, 21, 22, 23, 24, and 25.

Dated: Farmingdale, N.Y.
This 3rd day of November, 1981

s/Diane J. Geller, Esq.

Diane J. Geller
Corporate Administrator
Glover Bottled Gas Corporation

# Appendix H -
# National Labor Relations Board Charges, Filed August 21, 1981

12-671

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FILING EXEMPT UNDER 44 U.S.C. 3812

**ORIGINAL**

*INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.*

DO NOT WRITE IN THIS SPACE

Case No. 29-CA-9116

Date Filed 8-21-81

**1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT**

a. Name of Employer
Glover Bottle Gas

b. Number of Workers Employed
14

c. Address of Establishment (Street and number, city, State, and ZIP code)
675 Route 112 Patchogue, N.Y. 11772

d. Employer Representative to Contact
Gean Heyme

e. Phone No.
(516) 475-3122

f. Type of Establishment (Factory, mine, wholesaler, etc.)
Wholesaler

g. Identify Principal Product or Service
Propane Gas

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basic of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about August 10, 1981 the above-mentioned employer by its officers, agents and/or employees terminated Mae Nannery and Lorraine Lybinski because of their activities on behalf of and membership in the charging party.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)
Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

4a. Address (Street and number, city, State, and ZIP code)
1975 Linden Blvd., Elmont, New York 11003

4b. Telephone No.
(212) 343-3322

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)
I.B.T.C.W.H.A.

**6. DECLARATION**

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By O'Connor & Mangan, P.C. (Signature of representative or person filing charge) (Title, if any)

by: s/Bryan C. McCarthy
Bryan C. McCarthy
29-27 41st Avenue
L.I.C., N.Y. 11101

Address _____ (212) 361-7950 (Telephone number) August 19, 1981 (Date)

WILFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

## Appendix I - Excerpts of Transcript

to the issues which were raised in the prior proceeding.

And I think in view of the tremendous amount of time it would take to go through those same items of proof in this matter, we've already done it in the last matter, would waste not only the court's time but would cost a tremendous amount of money both for transcribing fees and the time of the court and all the parties involved.

I would, therefore, at this time, your Honor, move that you take administrative notice of the transript, the exhibits, the entire record, including the pleadings of the prior matter, 9116 et al, and incorporate that into the record in this case, and use that as you see fit in determining the issues in the instant matter.

JUDGE MORRIS: Mr. Gottlieb, do you wish to make any comments?

MR. GOTTLIEB: Yes. I join Mr. Shuzman in that motion.

I think it's very important that in considering whether or not to grant that, that you realize once again there really is no prejudice at all to Mr. Shientag or to Glover by doing that.

There can be no claim of surprise that the issues that we're going to be litigating during this hearing are issues that suddenly arose since the last hearing and therefore there may have been questions or documents that Mr.

* * *

the application be denied.

JUDGE MORRIS: Mr. Shuzman, is the purpose of your motion simply to provide background material?

MR. SHUZMAN: No, your Honor.

But I must say, first of all, one of the problems with Mr. Shientag's argument is that every bit of testimony that was relevant in the prior proceeding is relevant in this proceeding to show a background of animus and anti-union activity on behalf of Respondent.

So we could, in effect, go through the whole last case in this case. Every page of that testimony and every page of that transcript is relevant to the instant matter.

But we're not only offering it for background purposes.

First of all, you have a considerable issue, just off the top of my head, is to jurisdiction. We allege that Glover and a number of other groups were a single intergrated enterprise.

That took a tremendous amount of testimony. There are quite a number of documents. That issue is identical in this proceeding.

To go through that again, is just ridiculous, a waste of everybody's time, and could only be interposed by Mr. Shientag for the purpose of delay..

As far as Mr. Shientag not knowing what you're going to consider in this matter, as I said, all of the unfair labor practices are relevant as to motivation here.

And Mr. Shientag, if he has to address each one, that's the problem with a client who violated the law as monumentally as this one did, as this Respondent did.

The fact that Mr. Shientag doesn't know where to pick and choose from is not our problem. If the Respondent violated the law as General Counsel contends it does, unfortunately, to represent his client, he's got to meet each one of those allegations and each fact that's raised in both proceedings.

As far as Mr. Shientag not having the transcript, even Mr. Shientag admitted that he had portions of the transcript, and out of his own words, portions of the transcript that he thought to be relevant to this.

He's admitting that at least part of the transcript is relevant to this. But the fact that he doesn't have the entire transcript, is not something that we can really be concerned with.

He wasn't precluded from purchasing the transcript, number one. Number two, he knows that he can come to the Board offices at any time and read the transcript.

So he can't be heard to say that he doesn't have access to the transcript, he doesn't know what it says, he does have access.

* * *

and the theatrics, there's no jury here. Let him just go to the question about what her position, what her contention is. If he wants to probe that, fine.

But to spend the next day on the hierarchy of Glover is going to be a royal waste of time, it's a smokescreen and has nothing to do with these issues, and I think it's intended to do exactly what I suggest it's intended to do, to get you off the issues of this case.

JUDGE MORRIS: I presume that the reason for Mr. Shientag asking about the other supervisors, is to shed some light on whether it is reasonable to assume that Miss Gilner was also a supervisor.

In that connection, I will permit a certain amount of questions along those lines. I will not permit extensive questions because we already have that in the prior record.

But certainly enough questions so that you can develop your particular point.

MR. SHIENTAG: Thank you, your Honor, that wasn't my intention to dwell upon it, I wanted to set the context.

Q Let's go back to April 1981 when you say you became the head customer representative clerk –

MR. SHUZMAN: Objection.

MR. GOTTLIEB: No, that was not her testimony.

Again, it's a misstatement of the testimony.

JUDGE MORRIS: She testified that in February she

* * *

Q Anything is possible.

I want to know –

MR. GOTTLIEB: Your Honor, I'm going to object –

Q – what the fact is –

MR. GOTTLIEB: – she testified to the best of her recollection.

If Mr. Shientag has the company's records, I'm sure they will accurately reflect when she got the raises and what the raises were.

JUDGE MORRIS: This was gone into in the prior proceeding.

Does anyone know whether the records were put into evidence?

MR. SHUZMAN: I believe the records of the pay increases that were given to Wendy Gilner were put into evidence.

They were Respondent's first couple of exhibits.

JUDGE MORRIS: Then the record already shows whatever the increases were.

It doesn't really matter at this point whether she can remember exactly when she got the increase.

MR. SHIENTAG: Her claim is – the fact of what the date is is important because her claim is that she became Bill Sheridan's assistant in April –

MR. SHUZMAN: Your Honor, may I be heard?

* * *

to put it in context, and that's what's causing this case to go on forever.

JUDGE MORRIS: That's sufficient.

If you want to question her about conflicting testimony –

MR. SHIENTAG: Yes sir.

JUDGE MORRIS: – you can do that now.

But in terms of whether or not she was sales manager, who she had under her, what her duties were, I agree with Mr. Shuzman, that was gone into very adequately in the prior proceeding.

But in terms of conflicting statements, you can question her about that.

MR. SHIENTAG: This is where the conflict arises, right on this issue.

JUDGE MORRIS: Well if you have something specific that she has testified to in the prior proceeding, which is at variance with what she says now, then – or what she has already stated, you can ask about that.

But, if you want to ask her all the questions that we went into previously, with the hope that she will testify differently –

MR. SHIENTAG: No sir, I have no desire to do that.

JUDGE MORRIS: Okay. You may proceed.

MR. SHIENTAG: Can I have that last question? I just

* * *

What's the difference whether she told Castagna that she interrogated people?

The question is whether or not she was a supervisor, And if you're allowing him to go into that, let's limit it to that and let's not try whether or not she interrogated –

JUDGE MORRIS: That's correct.

MR. SHUZMAN: – the last case.

JUDGE MORRIS: That's correct. I'm not permitting the question with respect to interrogation. That was the prior case.

You've testified that you told Mr. Castagna you were part of management, is that correct?

THE WITNESS: That's correct.

Did you tell this to anyone else?

A Who else?

Whoever was at Glover knew my position at Glover.

I want to know if you told this to any official of Local 282?

MR. SHUZMAN: Objection.

JUDGE MORRIS: I think we're going somewhat far afield at this point.

Objection is sustained.

Q After you told this to Mr. Castagna, this question may have been asked, I don't recall precisely, did you – were you then called to testify in the election cases?

Q You don't remember?

A No.

Q Did I ask you about your position with the company?

A I don't remember if you asked me about my position with the company.

I know you asked me questions about Mae, Lee's statement, and you made a speech.

Q Did I ask you whether in fact you, Mae Nannery and Lee Purchia were all sales clerks?

A I don't think you asked me that.

Q What was your answer?

A You asked me questions on my duties, I think. I don't know if you asked me anything pertaining to all of us together. You asked me questions on me.

Q Did I ask you whether you had any authority over Lee Purchia?

JUDGE MORRIS: Miss Burke, try to speak up when you answer.

A I don't recall.

Q Did I ask you whether you had any authority over Mae Nannery?

MR. SHUZMAN: Your Honor, I'm going to object.

Not only has the witness in this series of questions said she doesn't remember, we went through all of these quesrions about ten minutes ago and she said she didn't

* * *

A Yes, I did.

Q What did you discuss with him?

A I discussed the back pay award with him, as well as the contents of the posting.

Q Where was Miss Lubinsky working at this time?

A At that time –

MR. SHUZMAN: Objection.

JUDGE MORRIS: I could see the relevance in terms of the posting and Mr. Garey knowing what the provisions say. I do not see the relevance of going into details concerning Miss Lubinsky. That was the prior case.

MR. SHIENTAG: I was not going to go into details. I just wanted to, as a matter of continuity in the record established, where Miss Lubinsky was working. The proof I want to elicit is that she had already transferred from Vogel's to Glover at tha time that this was going on.

JUDGE MORRIS: I imagine it is probably in the record of the prior proceeding, but I will allow it. Go ahead.

MR. SCHIENTAG: I wasn't going to spend more time that we have spent on discussing this. So that I don't think there is –

JUDGE MORRIS: My concern is that once you get into an area that opens it up to problems even possibly beyond that which you wish to get into.

A That's correct.

Q Would you tell us what that role encompassed?

A She was to assist me in my function in any way possible. She would advise me if I would need information she would obtain it for me. She would advise me of problems that she saw and where there was a problem involving customer service representatives or their might be a particularly irate customer – she was the most experienced and knowledgeable of the people out front. She would assist them in answering the question and refer any problems to me.

Q Did that function involve any independent action on her part?

A No.

JUDGE MORRIS: Mrs. Geller, since this is your first appearance as counsel in this case, let me remind you that the prior record in the prior Glover case is part of the record in this case and consequently it is not necessary to go over the same ground that was gone over there.

MRS. GELLER: Okay then, Your Honor, I am sitting here with a stack of exhibits which I understand to have just been admitted in this case, not in the prior case. So that's where I am heading.

JUDGE MORRIS: Fine.

MRS. GELLER: If they do, Your Honor, if they are in the prior case, I'm not aware of that. So I will withdraw my

# Appendix J -
# Excerpts of Transcript

P R O C E E D I N G S

(Time Noted: 11:25 a.m.)

JUDGE MORRIS: On the record.

This is a continuation in the hearing in the matter of Glover Bottled Gas Corporation et al, Case Numbers 29-CA-9116 and 9117, and 29-RC-5493, 5494, and 5495.

In addition, I am the Administrative Law Judge who has been assigned to hear Glover Bottled Gas Corporation et al, Case Number 29-CA-9764 and 29-CA-9811.

These two cases have been consolidated by order dated August 19th, 1982.

The General Counsel has moved to consolidate Case Numbers 29-CA-9764 and 29-CA-9811 with with present proceeding which we have been hearing.

Mr. Shientag has filed in opposition to the motion to consolidate.

We have had a prehearing conference this morning with respect to the motion to consolidate and the opposition. For purposes of the record, Counsel may state their positions.

Mr. Castagna?

MR. CASTAGNA: Your Honor, sound administrative practice dictates the consolidation of all pending charges involving the same respondent. This avoids time consuming and costly piecemeal litigation.

JUDGE MORRIS: Mr. Shientag?

MR. SHIENTAG: Are we going to hear from Mr. Gottlieb?

JUDGE MORRIS: Everybody. I was going to call on Mr. Gottlieb after you —

MR. SHIENTAG: Well, this will save my speaking twice.

MR. GOTTLIEB: I'd be happy to defer to Mr. Shientag.

JUDGE MORRIS: In view of the fact that, at least with respect to the hearing which has resumed today, Mr. Gottlieb is not counsel, I think the best procedure is to have Mr. Shientag speak first.

MR. SHIENTAG: All right, that's fine.

JUDGE MORRIS: Then we will hear from Mr. Gottlieb, who represents one of the charging parties in the new case.

MR. SHIENTAG: I have no problem.

There are a number of reasons why Glover Bottled Gas Corp et al are opposed to this consolidation.

Firstly, had this trial concluded in the ordinary course the question would never have arisen. The case would have been over and done with in June, or the early part of July.

None of these charges were then pending. No motions to consolidate were being made. No question of trying the discharges of Miss Burke and Miss Gilner were raised at that time.

And, it wasn't until after the adjournment of this case, fortuitous circumstance that it happens to be on now instead of before the cases were even brought, permits the question to be raised.

So, that, our first position is that anywhere in our judicial system somebody trying to bring a case in, a completely new case, in

the midst of a trial, it would not be countenanced, becasue the prejudice that is resultant upon the position of the Employer here by now injecting extraneous issues into the main case is and should be self-evident.

By the same token, the way in which the pending cases were tried would and should and will be different if these issues are now interjected.

We've got to divert ourselves from what we were dealing with, and now address ourselves to entirely new sets of issues and circumstances.

So, that even if there weren't other complications, that I will get to shortly, we would be opposed on the ground of prejudice and surprise to the consolidation of these issues at this point.

But, another, much more serious problem rears its ugly head at this point.

In the discharge cases involving Miss Gilner and Miss Burke, both myself and my associate, Miss Geller, are probably indispensable, certainly desirable, witnesses.

At the moment, I do not see how I can try the discharge cases, or have the discharge cases tried, without my testifying.

There is not the slightest doubt in my mind that I must call on the discharge cases, Miss Geller, because her testimony with respect to matters happening prior to the dates of discharge is available only through her.

I'm talking about events which happened outside of my presence.

So, I have both events which happened outside of my presence, and in Miss Geller's presence, and events which happened in both of our presence involved in the discharge cases.

I believe it is clear that under the canons of ethics applicable to lawyers practicing in the first and second departments of the State of New York, it would be improper for both of us, both Miss Geller and myself, to testify, and for both of us to appear as Counsel for the Employer in the case.

Therefore, since she must testify, she cannot appear as Counsel.

And, since I may testify, I don't consider my

No. 86-819

# In the Supreme Court of the United States

OCTOBER TERM, 1986

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GLOVER BOTTLED GAS CORPORATION, ET AL.,
PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioners contend that the Board violated its procedural rules and the requirements of due process by incorporating the record of a prior unfair labor practice proceeding into the record of a subsequent related proceeding concerning the same parties.

1. a. Petitioners are three corporations that the Board found to be "a single integrated business enterprise and a single employer." Pet. App. D3; see also *id.* at E4-E6. This case concerns events sur-

rounding three separate union certification elections held at petitioners' facilities on September 10-11, 1981, pursuant to petitions filed by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The vote in two of the elections was against the union; the outcome of the third election depended upon the disposition of challenges to three of the ballots. The union filed objections to petitioners' conduct with respect to all three elections; it asserted that petitioners both committed unfair labor practices and illegally influenced the results of the elections. Petitioners objected to the union's conduct in connection with the election in which the outcome was uncertain. The General Counsel of the National Labor Relations Board issued a complaint on the basis of some of the objections and a hearing was held before an administrative law judge. *Id.* at E2-E3 & n.2.

The administrative law judge found that petitioners violated the National Labor Relations Act in that two employees were discharged in retaliation for their union activities (Pet. App. E6-E13), a supervisor interrogated two employees about their intention to join the union (*id.* at E14-E15), and counsel for petitioners engaged in impermissible interrogation of two employees in anticipation of the employees' appearance at the hearing on the charges growing out of the elections (*id.* at E25-E26). As the remedy for these unfair labor practices, the ALJ recommended the reinstatement of the discharged employees and various other forms of relief (*id.* at E30-E32).[1]

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[1] The ALJ also recommended that new elections be held because of this unlawful conduct (Pet. App. E28-E29).

In June 1982, while the hearing regarding the charges discussed above was underway, charges were filed by the union alleging that petitioners had committed additional unfair labor practices. The General Counsel issued a complaint alleging that petitioners had discharged two employees because of their actual or anticipated testimony at the hearing. Following a separate hearing on these charges, the ALJ found that the employees had been discharged in violation of the Act. Rejecting petitioners' claims that the employees were discharged because they had lied to petitioners' attorneys, the ALJ found that the employees were discharged because petitioners believed the employees' testimony would be harmful to petitioners' position on the merits. Pet. App. D10-D16. The ALJ recommended the reinstatement of the employees and various other relief (*id.* at D17-D19).

The Board consolidated the two cases for review. It affirmed the decisions of the administrative law judge and adopted his recommendations in both cases. Pet. App. C1-C6.[2]

b. After the issuance of the complaint relating to the second set of unfair labor practice charges, the General Counsel moved to consolidate these new charges with the complaint that was the subject of

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[2] Prior to its decision, the Board remanded the proceedings to the ALJ for reconsideration of certain credibility determinations (Pet. App. C2). In addition to affirming the ALJ's decisions on the unfair labor practice charges, the Board adopted the ALJ's recommendations regarding the scheduling of new elections (*id.* at C3-C6). That ruling is not a final order under Section 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. 160(e) and (f), and therefore was not before the court below.

the ongoing hearing on the first set of charges.[3] The ALJ acknowledged that the Board's procedures normally require consolidation of all outstanding complaints involving the same respondent. Tr. I, at 2702-2703; see *Peyton Packing Co.*, 129 N.L.R.B. 1358, 1360 (1961).[4] Petitioners objected to consolidation on the grounds that (1) an important witness was ill, and (2) petitioners' counsel might be required to testify in the proceeding on the new charges, and petitioners therefore might be required to obtain new counsel if the cases were consolidated. The ALJ denied the motion to consolidate, but added that in order to obviate any need to "repeat * * * the many days of hearing," the testimony in the first proceeding could be incorporated into the record of the second proceeding (Tr. I, at 2703-2704).

When the hearing in the second proceeding began, the ALJ granted the General Counsel's motion to take administrative notice of the record of the first proceeding and incorporate that record into the record of the second proceeding (Tr. II, at 29-37). Citing *Plant City Welding & Tank Co.*, 123 N.L.R.B. 1146, 1149-1150 (1959), the ALJ rejected petitioners' objections to incorporation, explaining that "[i]t is well established that the Board may take official notice of its own proceedings and decisions and rely thereon including the use of * * * evidence adduced in a prior case, especially where the same parties

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[3] The hearing in the first proceeding began on June 7, 1982 and ended on October 12, 1982 (Pet. App. E1-E2). The complaints in the second proceeding were issued on July 23 and August 13, 1982 (*id.* at D1-D2).

[4] "Tr. I" refers to the transcript of the hearing in the first proceeding. "Tr. II" refers to the transcript of the hearing in the second proceeding.

were present and participated." Tr. II, at 36-37; see also Pet. App. D2 n.2.

2. The court of appeals unanimously upheld the Board's determination in an unpublished order (Pet. App. B1-B3). The court rejected petitioners' contention that they were denied due process because the record of the first proceeding was incorporated into the record of the second proceeding. Noting petitioners' claim that incorporation of the testimony of witnesses who were available to testify in the second proceeding contravened Rule 804(b)(1) of the Federal Rules of Evidence, the court stated that "there is no error in the admission of hearsay testimony at administrative hearings, provided that such evidence bear satisfactory indicia of reliability" (Pet. App. B3 (citation omitted)). The court added that "[i]n any event, [petitioners] have demonstrated no prejudice resulting from the procedure adopted by the ALJ" (*ibid.*).

3. The unanimous decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

a. Petitioners assert (Pet. 9-12) that they were unable to develop evidence relevant to an issue in the second proceeding—the state of mind of Wendy Gilner, one of the discharged employees. That contention is meritless.

First, contrary to petitioners' apparent view, the General Counsel had no obligation to inform petitioners of the types of evidence that might be relevant to the charges in the complaint. To the extent that petitioners' claim is that they failed to adduce this evidence because of their erroneous view of the relevant legal standard, they plainly do not state a due process violation.

Second, Gilner testified at both hearings; petitioners therefore had ample opportunity to examine Gilner regarding the relevant facts. See Pet. App. D3-D10, E19-E20. Petitioners' conclusory claim that they were prevented from adducing facts relevant to the charges contained in the second complaint is insufficient to overcome the express finding of the court of appeals that petitioners failed to demonstrate any prejudice flowing from the ALJ's decision to incorporate the record of the first proceeding (*id.* at B3).[5]

b. Petitioners also contend (Pet. 12-14) that the Board's decision should be set aside because the incorporation of the record of the first hearing violated the Federal Rules of Evidence. The court below properly rejected that claim.

The Federal Rules of Evidence by their terms do not apply to agency proceedings. Fed. R. Evid. 101 ("[t]hese rules govern proceedings in the courts of the United States and before United States magistrates").[6] The Board's rules state that the Federal

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[5] In the decision relied upon (Pet. 9-11) by petitioners, *NLRB* v. *Kanmak Mills*, 200 F.2d 542, 545-546 (3d Cir. 1952), a new charge was added to the complaint at the end of a hearing; the charge alleged in the original complaint was not sustained and the employer was found to have violated the Act on the basis of the charge in the amended complaint. The court of appeals held that in those circumstances the employer had been denied an opportunity to contest the new charge. See also *NLRB* v. *H.E. Fletcher Co.*, 298 F.2d 594, 600 (1st Cir. 1962) ("the Board made a finding of a violation which was neither charged in the complaint nor litigated at the hearing"). Here, by contrast, there was no amendment of the complaint; petitioners were given the opportunity to litigate fully the charges that formed the basis of the second proceeding.

[6] Indeed, the decision cited by petitioner as conflicting with the decision below (Pet. 14) states "[n]ot only is there

Rules of Evidence apply in Board proceedings only "so far as [they are] practicable." 29 C.F.R. 101.10 (a); see also 5 U.S.C. 556(d) ("[a]ny oral or documentary evidence may be received" in an administrative hearing). And the Board has made clear that it may rely upon evidence adduced in a prior case between the same parties (*Plant City Welding & Tank Co.*, 123 N.L.R.B. 1146, 1150 (1959), remanded on other grounds, 281 F.2d 688 (5th Cir. 1960)).

The ALJ did not err by applying that general rule in the present case. The evidence here plainly was reliable—indeed, it was adduced at a proceeding at which petitioners were represented and had an opportunity to cross-examine the witnesses—and petitioners have not shown any prejudice from the procedure followed by the ALJ. There is no warrant for review by this Court of the ALJ's fact-bound determination.[7]

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no administrative rule of automatic exclusion for hearsay evidence, but the only limit to the admissibility of hearsay evidence is that it bear satisfactorily indicia of reliability" (*Calhoun* v. *Bailar*, 626 F.2d 145, 148 (9th Cir. 1980), cert. denied, 452 U.S. 906 (1981)). Since the record had been created at an adversary proceeding between the same parties, that requirement is satisfied here.

[7] The decision cited by petitioners (Pet. 13)—*Union of Operating Engineers, Local 926*, [1985-1986] NLRB Dec. (CCH) ¶ 17,492 (Oct. 22, 1985)—relates only to the admissibility of affidavits. The Board stated (*id.* at 30,078) that "Board precedent establishes that the requirements of Federal Rule of Evidence 804(a) must be met for affidavits of an unavailable witness to be admissible"; it did not address the incorporation of testimony from a prior Board hearing into the record of a subsequent, related proceeding.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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